

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
ACQUISITION REGULATION
STAFF MANUAL

April 1, 1984

EXPLANATORY NOTICE

In the codified version of the HHS Acquisition Regulation (HHSAR), 48 CFR Chapter 1 (the Federal Register version), the term "[Reserved]" and the CFR paragraph designation to which the term referred were deleted from the entire Chapter by an amendment to the original document. This was done to accommodate the regulatory requirement of the Office of the Federal Register prescribing the use of the term "[Reserved]," and to eliminate any concern that the HHSAR may be disregarding or negating the corresponding text in the Federal Acquisition Regulation (FAR), 48 CFR Chapter 1.

However, in this loose-leaf version of the HHSAR, which contains the same regulatory text as the codified version, the Department has opted to retain the term "[Reserved]" and the paragraph designation to which the term refers. This is being done to present a sequential flow within the sections where the term appears, make it easier for the user to follow, and eliminate possible user confusion that paragraphs might be mislettered. The use of the term does not, in any way, negate or modify the corresponding FAR text.

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HHS Acquisition Regulation System

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Subpart 301.1

Purpose, Authority, Issuance

301.101 Purpose.

(a) The Department of Health and Human Services Acquisition Regulation (**HHSAR**) is issued to establish uniform acquisition policies and procedures for the Department of Health and Human Services (**HHS**) which conform to the Federal Acquisition Regulation (FAR) System.

(b) The **HHSAR** implements and supplements the FAR. (Implementing material expands upon or indicates the manner of compliance with related FAR material. Supplementing material is new material which has no counterpart in the FAR.)

(c) The **HHSAR** contains all formal departmental policies and procedures that govern the acquisition process or otherwise control contracting relationships between the Department's contracting offices and contractors.

301.102 Authority,

The **HHSAR** is prescribed by the Assistant Secretary for Management and Budget under the authority of 5 U.S.C. 301 and Section 205 (c) of the Federal Property and Administrative Services Act of 1949, as amended (40 **U.S.C.** 486(c)), as delegated by the Secretary. The Assistant Secretary for Management and Budget has redelegated the authority to establish all departmental acquisition policy and publish all acquisition regulations to the Deputy Assistant Secretary for Management and Acquisition. This authority is not redelegable.

301.103 Applicability.

The FAR and **HHSAR** apply to all **HHS** acquisitions as stated in FAR 1.103. Unless specified otherwise, these regulations apply to acquisitions within and outside the United States.

301.104 Issuance.

301.104-1 Publication and code arrangement.

(a) The **HHSAR** is also published in the same forms as indicated in FAR 1.104-1(a).

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(b) The HHSAR is issued in the Code of Federal Regulations (CFR) as Chapter 3 of Title 48, Department of Health and Human **Services** Acquisition Regulation. It may be referenced as "48 CFR Chapter 3."

301.104-2 Arrangement of regulations.

(a) General. The HHSAR conforms to the FAR with respect to divisional arrangements: i.e., subchapters, parts, subparts, sections, subsections, and paragraphs.

(b) Numbering. The FAR System of numbering permits the keying of the same or similar subject matter throughout Chapters 1 (FAR) and 3 (HHSAR). However, unlike the FAR numbering scheme, our scheme varies somewhat in the numbering to the left of the decimal point. Whereas the FAR only identifies the part number to the left of the decimal point, our corresponding reference identifies the chapter as well. For example, this corresponding paragraph in the FAR is numbered 1.104-2(b) where "1" is the part number (may be one or two digits and is followed by a decimal point). "1" (to the right of the decimal point) is the subpart number, "04" (always two digits) is the section number, "2" is the subsection number (always hyphenated), and "(b)" is the paragraph reference. The corresponding HHSAR reference is 301.104-2 (b) where the "3" or first digit is the chapter number assigned to the particular department or agency (may be two digits), and the "01" represents the part number (part numbers will always be two digits for agencies implementing the FAR). The remaining numbers are identical to and represent the same divisions as the FAR example.

(c) References and citations.

(1) Unless otherwise stated, references indicate parts, subparts, sections, subsections, etc. of this regulation, the HHSAR.

(2) This regulation shall be referred to as the Department of Health and Human Services Acquisition Regulation (HHSAR). Any reference may be cited as "HHSAR" followed by the appropriate number. Within the HHSAR, the number alone will be used.

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(3) Citations of authority shall be incorporated where necessary. All FAR reference numbers shall **be preceded** by "FAR".

301.104-3 Copies.

Copies of the HHSAR in Federal Register and CFR form may be purchased by the public from the Superintendent of Documents, Government Printing Office (GPO), Washington, D.C. 20402. Loose-leaf copies of the HHSAR may be obtained by departmental personnel having a need for the document by placing an order with a Directives Distribution Coordinator in accordance with General Administration Manual Chapter 1-00, **HHS** Staff Manual System.

301.105 **OMB** approval under the Paperwork Reduction Act.

The following **OMB** control numbers **apply to** the information collection and recordkeeping requirements contained in this regulation:

HHSAR Segment	OMB Control Number
315.4	0990-0139
324.70	0990-0136
332.406	0990-0134
342.7103	0990-0131
352.215-71	0990-0139
352.216-70	0990-0138
352.224-70	0990-0136
352.228-70	0990-013s
352.232-71	0990-0134
352.232-73	0990-0134
352.233-70	0990-0133
352.270-1	0990-0129
352.270-2	0990-0129
352.270-3	0990-0129
352.270-5	0990-0130
370.1	0990-0129
370.2	0990-0129

The **OMB** control number "**OMB No. 0990-0115**" is to be included in the upper right corner of the first page of all

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solicitations, purchase orders, and contracts issued by departmental contracting activities. The number represents approval of the **HHS** acquisition process and covers recordkeeping and reporting requirements which are unique to individual acquisitions (e.g., requirements contained in specifications, statements of work, etc.).

Subpart 301.2

Administration

301.201 Maintenance of the HHSAR.

(a) The **HHSAR** is prepared and issued under the authority of the Deputy Assistant Secretary for Management and Acquisition. Acquisition policies and procedures which are necessary to **implement**, supplement, or deviate from the FAR will be issued in the HHSAR by the Deputy Assistant Secretary for Management and Acquisition when necessary to accomplish Department-wide acquisition objectives.

(b) The HHSAR is maintained by the Office of Acquisition and Grants Management. The Director, Office of Acquisition and Grants Management is responsible for developing and preparing for issuance all acquisition regulatory material to be included in the HHSAR.

301.270 Executive Committee for Acquisition.

(a) The Deputy Assistant Secretary for Management and Acquisition has established the Executive Committee **for** Acquisition (ECA) to assist and facilitate the planning and development of departmental acquisition policies and procedures and to assist in responding to other agencies and organizations concerning policies and procedures impacting the Federal acquisition process.

(b) The **ECA** consists of members and alternates from the Office of Acquisition and Grants Management, Division of Contract Operations - OS, Office of Human Development Services, Health Care Financing Administration, Social Security Administration, Public Health Service, and, collectively, the regional offices. The ECA is chaired by the Director, Office of Acquisition and Grants Management. All meetings will be held at the call of the Chairman, and all activities will be carried out under the direction of the Chairman.

(c) The ECA, to facilitate the planning, development, and coordination of governmentwide and departmentwide acquisition policies and procedures, is to:

(1) Advise and assist the Chairman concerning major acquisition policy matters;

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(2) Review and appraise, at appropriate intervals, the overall effectiveness of existing policies and procedures; and

(3) Review and appraise the impact of new major acquisition policies, procedures, regulations, and developments on current acquisition policies and **procedures**.

(d) The Chairman will periodically issue a list of current members and alternates specifying the name, title, organization, address, and telephone number of each. The member organizations are responsible for apprising the Chairman whenever a new member or alternate is to be appointed to the ECA.

301.271 Timing of **HHSAR** revisions.

HHSAR revisions will be issued throughout the year as the need *arises*. **HHSAR** material shall become effective on the date cited in the Federal Register issuance or on the date of the transmittal notice which distributes it to **HHSAR** Staff Manual holders, unless otherwise indicated.

Agency Acquisition Regulations

Each OPDIV or lower level acquisition regulation Will be included in its entirety as a separate appendix to 48 **CFR** Chapter 3. The Director, Office of Acquisition and Grants Management will assign the appendix designation upon approval of the initial request to establish the OPDIV or lower level acquisition regulation.

Subpart 301.3

Agency Acquisition Regulations

301.301 Policy.

(a)(1) The FAR and HHSAR are intended to provide all necessary regulatory guidance for the conduct of the acquisition process within the Department. However, there may be some rare instances where regulations are necessary to implement and/or supplement the FAR and/or HHSAR at the Operating Division (OPDIV) level or lower. The Department discourages the proliferation of OPDIV **and lower** level issuances, but will allow lower level issuances when deemed pertinent.

301.302 Limitations.

The same limitations applicable to the FAR also apply to the HHSAR.

301.303 Publication and codification.

(a) The HHSAR shall be codified in Chapter 3 of Title 48, Code of Federal Regulations. Any OPDIV or lower implementation or supplementation of the HHSAR or FAR shall also be codified as part of Chapter 3. Implementing material is that which expands upon or indicates the manner of compliance with related higher level material. Supplementing material is that for which there is no counterpart. Where material in the FAR requires no implementation, there will be no corresponding numbers in the HHSAR. Thus, there are gaps in the HHSAR sequence of numbers where the FAR, as written, is deemed adequate. Supplementary material shall be numbered as specified in FAR 1.303.

301.304 Agency control and compliance procedures.

(a) Whenever an OPDIV or lower level organization determines a need for an acquisition regulation not covered by the FAR or HHSAR or wishes to implement or supplement the coverage in either, the organization shall prepare a memorandum that explains the need, background, justification, and significant aspects of the proposed regulation and send it, together with an outline, to the Director, Office of Acquisition and Grants Management. The Director will analyze the request to determine if it has applicability to the HHSAR or FAR: if not, the Director will either approve or disapprove the request for incorporation into the organization's acquisition regulation. If the request is approved, the organization must prepare the proposed regulation in Federal Register format, obtain all necessary concurrences, including Office of General Counsel -

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Business and Administrative Law Division, and send it to the Director, Office of Acquisition and Grants Management for review and approval. The regulation must be prepared for signature by the Deputy Assistant Secretary for Management and Acquisition. All regulations will be required to be processed through the public rulemaking process in the Federal Register.

(b) Only the organizations listed in paragraph (d) are authorized to establish acquisition regulations. As of the date of issuance of the HHSAR, no acquisition regulations below the HHSAR level exist, and the procedures detailed in paragraph (a) must be followed to initiate the establishment of an OPDIV or lower level regulation.

(c) Under no circumstances shall any organization's implementation or supplementation of the FAR or HHSAR conflict with, supersede, or repeat, paraphrase, or otherwise restate policies or procedures prescribed by these regulatory issuances. OPDIV or lower level material shall follow the numbering system, format, and arrangement of the FAR and HHSAR and will be applicable only within the organization issuing it. One copy of all OPDIV or lower level material issued in loose-leaf format shall be furnished the Director, Office of Acquisition and Grants Management at the time of issuance.

(d) Material issued by OPDIV or lower level organizations to implement **and** supplement the HHSAR and FAR shall be identified by prefixes to the digit 3 (indicating Chapter 3 - HHSAR) as follows, and shall use the same numbering system as the HHSAR:

<u>Organization</u>	<u>Prefix</u>
Office of the Secretary	OS
Health Care Financing Administration	HCFA
Office of Human Development Services	OHDS
Public Health Service	PHS
Alcohol, Drug Abuse, and Mental Health Administration	ADAMHA
Centers for Disease Control	CDC
Food and Drug Administration	FDA
Health Resources and Services Administration	HRSA
Indian Health Service	IHS
National Institutes of Health	NIH
Social Security Administration	SSA

Agency Acquisition Regulations

Each OPDIV or lower level acquisition regulation will be included in its entirety as a separate appendix to 48 **CFR** Chapter 3. The Director, Office of Procurement and Logistics Policy will assign the appendix designation upon approval of the initial request to establish the **OPDIV** or lower level acquisition regulation.

subpart 301.4

Deviations from the FAR

301.403 Individual deviations.

Requests for individual deviations to either the FAR or **HHSAR** shall be prepared in accordance with 301.470 and forwarded through administrative channels to the Director, Office of Acquisition and Grants Management for review and approval.

301.404 Class deviations.

Requests for class deviations to either the FAR or **HHSAR** shall be prepared in accordance with 301.470 and forwarded through administrative channels to the Deputy Assistant Secretary for Management and Acquisition for review and approval.

301.470 Procedure.

(a) When a contracting activity or contracting office determines that a deviation is **needed**, it shall prepare a deviation request in memorandum form and forward it through administrative channels to the official designated in 301.403 or 301.404. In an exigency situation, the contracting activity or contracting office may request a deviation verbally, but is required to confirm the request in writing as soon as possible.

(b) A deviation request shall clearly and precisely set forth the:

- (1) Nature of the needed deviation:
- (2) Identification of the FAR or **HHSAR** from which the deviation is needed:
- (3) Circumstances under which the deviation would be used:
- (4) Intended effect of the deviation:
- (5) Time-frame; and
- (6) Reasons which will contribute to complete understanding and support of the requested deviation. A copy of pertinent background papers such as a form or contractor's request should accompany the deviation request.

Subpart 301.5

Agency and Public Participation

301.501 Solicitation of agency and public views.

301.501-2 Opportunity for public comments.

(a) Reserved.

(b) Public opportunity for comment on proposed changes or additions to the HHSAR or lower level acquisition regulations will be offered whenever the proposed regulation will have an **impact** on the public and/or contractors. This **will** be **accomplished** by publishing a notice of proposed rulemaking in the Federal Register **which** will include the proposed language and the background and rationale for the proposed regulation. **Comments** will not be **solicited** directly from professional or industry associations or other interested parties; they will be expected to respond based upon the Federal Register notification. **Normally**, the public will be given 45 days to **comment**. Proposed changes or additions to the HHSAR or FAR shall be staffed to the Executive Committee for Acquisition in accordance with 301.270.

301.501-3 Exceptions.

Comments will not be solicited from the public when the change or addition to the **HHSAR** or lower level acquisition regulation is deemed procedural in nature and concerns internal administrative directions aimed at departmental personnel (see FAR 1.301(b)).

301.503 Public meetings.

Public meetings will not **normally** be used to solicit **comments** or views on HHSAR or lower level acquisition regulations. However, when the topic is so controversial that the Department or OPOIV believes a public meeting would be beneficial, public meetings will be convened.

Subpart 301.6

Contracting Authority and Responsibilities

301.602 Contracting officers.

301.602-3 Ratification of unauthorized commitments.

(b) **Policy.** (1) The Government is not bound by agreements or contractual commitments made to prospective contractors by persons to whom contracting authority has not been delegated. However, execution of otherwise proper contracts made by individuals without contracting authority, or by contracting officers in excess of the limits of their delegated authority, may be later ratified. The ratification must be in the form of a written document clearly stating that ratification of a **previously** unauthorized act is intended and must be signed by the head of the contracting activity (**HCA**).

(2) The **HCA** or his/her designee is the official authorized to ratify an unauthorized commitment (but see (b) **(3)**, below).

(3) Ratification authority may be redelegated by HCA, but not below the level of the principal official responsible for acquisition (**PORA**).

(c) **Limitations.** (5) The concurrence of legal counsel concerning the payment issue is optional.

(7) The ratification shall be in written document form containing verification of each limitation stated in PAR 1.602-3 (C) **(1)-(6)**, and shall be processed in accordance with 301.602-3(e) **Procedures.**

(e) **Procedures.** (1) The individual who made the unauthorized contractual commitment shall furnish the reviewing contracting officer all records and documents concerning the commitment and a complete written statement of facts, including, but not limited to: a statement as to why the contracting office was not used, a statement as to why **the proposed** contractor was selected, a list of other sources considered, a description of work to be performed or products to be furnished, the estimated or agreed contract price, a citation of the appropriation available, and a statement of whether the contractor has commenced performance.

Contracting Authority and Responsibilities

(2) The contracting officer will review the submitted material, and prepare the ratification document if he/she determines that the commitment may be ratifiable. The contracting officer shall forward the ratification document and the submitted material to the HCA or designee with any comments or information which should be considered **in** evaluation of the request for ratification. If legal review is desirable, the HCA or designee will coordinate the request **for** ratification with the Office of General Counsel, Business and Administrative Law Division.

(3) If ratification is authorized by the HCA or designee, the file will be returned, along with the ratification document, to the contracting officer for issuance of a purchase order or contract, as appropriate.

(4) **HCA's** or their designees will report the number and dollar value of requests for ratifications received and ratifications authorized each calendar quarter. Reports shall be submitted in an original and one copy to the Deputy Assistant Secretary for Management and Acquisition to arrive no later than 30 calendar days after the close of each calendar quarter.

301.603 Selection, appointment, and termination of appointment.

301.603-1 General.

(a) The appointment and termination of appointment of contracting officers shall be made by the principal official responsible for acquisition (PORA). This authority is not delegable. The head of the contracting activity shall ensure that only the PORA is redelegated, and exercises, this authority.

(b) Only GS-1105 and 1106 and **GS/GM-1101** and 1102 personnel shall be appointed as contracting officers (see 301.603-3(b)).

(c) The appointment of contracting officers shall be made at one of the four levels specified under the HHS Acquisition Certification Program (see 301.603-3(b)).

(d) An individual shall be appointed only in instances where a valid organizational need for a contracting officer can be demonstrated or a replacement position is to be filled. Factors to be considered in assessing the need for a contracting officer appointment include volume of actions, complexity of work, and structure of the organization.

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301.603-2 Selection.

(a) When an organizational need for a contracting officer is determined or a replacement is required, an official (usually the prospective contracting officer's immediate supervisor) will nominate a contracting officer candidate. The nomination shall be accompanied by the candidate's current Standard Form (SF) 171, Personal Qualifications Statement, that contains all relevant information, to include that stated in FAR 1.603-2, a copy of the nominee's most recent performance appraisal, and a copy of the certificate issued under the HHS Acquisition Certification Program indicating the current level of certification.

(b) The PORA shall review the submitted material to determine the candidate's ability to perform the contracting functions required to meet the organizational need. If the PORA requires additional information to make the decision, it shall be provided expeditiously by the nominating official.

301.603-3 Appointment.

(a) Contracting officer appointments shall become effective when the PORA signs the Standard Form (SF) 1402, Certificate of Appointment. SF 1402's shall be prepared and maintained in accordance with FAR 1.603-3.

(b) Appointments shall be made at one of the four levels established by the HHS Acquisition Certification Program. Therefore, the contracting officer candidate must meet the minimum eligibility requirements of certification for one of the four stated levels. The level will be determined by the organizational need or position being refilled (replacement). The four levels are as follows:

(1) LEVEL I - PURCHASING AGENT - Mandatory for all personnel who have signature authority for small purchases (GS-3.102, 1105, and 1106), including orders from GSA sources.

(2) LEVEL II - ACQUISITION OFFICIAL - Mandatory for those in the GS-1102 series. Sufficient for delegation of contracting officer authority to a maximum of \$100,000.

(3) LEVEL III - SENIOR ACQUISITION OFFICIAL - Mandatory for those in the GS-1102 series for delegation of contracting officer authority above \$100,000.

Contracting Authority and Responsibilities

(4) LEVEL IV - ACQUISITION MANAGER - Mandatory for preaward review and approval authority as specified in HHSAR Subpart 304.71.

(c) Changes to contracting officer appointments, either increasing or decreasing the warrant limitations, shall be made by the PORA. Changes must be made from one of the four certification levels to another, or within one of the certification levels, and must be implemented by the PORA's issuance of a new SF 1402 to replace the existing SF 1402.

(d) Personnel shall not ordinarily be appointed as contracting officers if they do not meet the qualifications prescribed for one of the four certification levels. However, if it is essential to appoint a contracting officer who does not fully meet the certification qualifications, an interim appointment may be granted by the PORA. The PORA shall require as a condition of the interim appointment that all training or experience requirements be met within a six month time period. Usually, interim appointments shall not exceed six months. Failure to successfully complete the necessary training requirements or gain the experience within this time frame will result in termination of the appointment, unless the PORA determines that unusual circumstances prevented the attainment of either. In this instance, one additional six month interim appointment may be issued, but no more shall be allowed. The PORA shall fully document all interim appointment actions.

(e) The original SF 1402 shall be provided to the contracting officer, and a copy shall be retained by the PORA. Another copy of the SF 1402 along with the SF 171 material shall be forwarded to the servicing personnel office *for inclusion in* the individual's personnel file folder. Files on individuals should not be established by the PORA.

301.603-4 Termination.

Termination of contracting officer appointments shall be executed by the PORA in accordance with FAR 1.603-4.

301.603-70 Delegation of contracting officer responsibilities.

(a) Non-GS/GM-1101 or 1102 or GS-1105 or 1106 personnel shall only be delegated contracting officer responsibilities when determined necessary by a warranted contracting officer (holder of a valid SF 1402), and in accordance with this subsection. Personnel, such as a contracting officer's representative or an ordering officer, shall be delegated only the needed

Contracting Authority and Responsibilities

responsibilities by the warranted contracting officer in a written memorandum of delegation which clearly states any limitations on the delegation. Personnel who are not in the **GS/GM-1101** or 1102 or GS-1105 or GS-1106 job series shall not be issued a SF 1402, Certificate of Appointment.

(b) Non-acquisition personnel who are delegated acquisition responsibilities shall be required to have the training, experience, and education requirements necessary for the responsibilities assigned. If, for example, responsibility is to be delegated for making small purchases, the training, education and experience for Level I - Purchasing Agent, or its equivalent as determined by the PORA, shall be required.

301.670 Head of the contracting activity.

301.670-1 Responsibility.

The head of the contracting activity (HCA) is responsible for conducting an effective and efficient acquisition program. Adequate controls shall be established to assure compliance with applicable laws, regulations, procedures, and the dictates of good management practices. Periodic reviews shall be conducted and evaluated by qualified personnel, preferable assigned to positions other than in the contracting office being reviewed, to determine the extent of adherence to prescribed policies and regulations, and to detect a need for guidance and/or training.

301.670-2 Designation.

Each OPDIV head and PHS agency head has been designated as HCA along with the following officials:

(a) Deputy Assistant Secretary for Management and Acquisition, and

(b) Each Regional Director.

301.670-3 Redlegation.

(a) The heads of contracting activities may redelegate their HCA authorities to the extent that redelegation is not prohibited by the terms of their respective delegations of authority, by law, by the Federal Acquisition Regulation, by the HHS Acquisition Regulation, or by other regulations. However, HCA and other contracting approvals and authorities shall not be redelegated below the levels specified in the HHS Acquisition Regulation or, in the absence of coverage in the HHS Acquisition

Contracting Authority and Responsibilities

Regulation, the Federal Acquisition Regulation. To ensure proper control of redelegated acquisition authorities, **HCA's** shall maintain a file containing successive delegations of HCA authority through and including the contracting officer level.

(b) Personnel delegated responsibility for acquisition functions must possess a level of experience, training, and ability commensurate with the complexity and magnitude of the acquisition actions involved.

Subpart 301.7

Determinations and Findings

301.703 **Class** determinations and findings.

(a) Reserved.

(b) All class determinations and findings (**D&F's**) shall be limited to a period of one year or less.

301.704 Content.

An example of a D&F format may be found in 316.301-3(c). All **D&F's** shall **be** prepared using the referenced format and shall include the **information** required by FAR **1.704(a)-(g)**.

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Part. 302

Definitions of Words and Terms

Subpart 302.1 • Definitions

Section 302.100 Definitions of **terms**.

- I "Chief of the contracting office."
- "Head of the agency."
- "Head of the contracting activity."
- "Principal official responsible for acquisition."

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Subpart 302.1

Definitions

302.100 Definitions of terms.

"Chief of the contracting office" (CCO) is a mid-level management official in charge of a contracting office who controls and oversees the daily contracting operation of an Operating Division (OPDIV) or major component of an OPDIV. The CCO is subordinate to the principal official responsible for acquisition and is located at a management level above other contracting personnel, usually as a branch chief.

"Head of the agency" or "agency head" means the head of the Operating Division (OPDIV) for HCFA, OHDS, PHS, and SSA, or the Assistant Secretary for Management and Budget (ASMB) for the Office of the Secretary (OS).

"Head of the contracting activity" (HCA) - see 301.670-2.

"Principal official responsible for acquisition" (PORA) is defined in terms of certain organizational positions within the Office of Management and Acquisition (OMAC-OS), Health Care Financing Administration (HCFA), Office of Human Development Services (OHDS), Office of the Assistant Secretary for Health (OASH), Alcohol, Drug Abuse, and Mental Health Administration (ADAMHA), Centers for Disease Control (CDC), Food and Drug Administration (FDA), Health Resources and Services Administration (HRSA), Indian Health Service (IHS), National Institutes of Health (NIH), Social Security Administration (SSA), and the Regional Offices (RO's), as follows:

OMAC-OS - Director, Division of Contract Operations

HCFA - Director, Office of Acquisition and Grants, Office of Budget and Administration

OHDS - Director, Grants and Contracts Management Division, Office of Management Services

OASH - Director, Division of Acquisitions Management, Administrative Services Center, Office of Management

ADAMHA - Director, Division of Grants and Contracts Management, Office of the Administrator

CDC - Director, Procurement and Grants Office, Office of the Center Director

Definitions

- FDA** - Director, Division of Contracts and Grants Management,
Office of the Associate Commissioner for Management and
Operations
- HRSA** - Director, Division of Grants and Procurement Manage-
ment, **Office** of Management
- IHS** - Director, Division of Contracts and Grants
Policy, Office **of** Administration **and Management**
- NIH** - Director, Division of Contracts and Grants,
Office of Administration
- SSA** - Associate Commissioner, **Office** of Acquisition and
Grants
- RO's** - Director, Regional Administrative Support Center

The PORA is subordinate to the head **of** the contracting activity and is the official in charge of the major contracting operation activity within the OPDIV, agency, staff office, or regional office.

Part 303

Improper Business Practices and
Personal Conflicts of Interest

Subpart 303.1 • Safeguards

Section

303.101
303.101-3

Standards of conduct.
Agency regulations.

Subpart 303.2 • Contract Gratuities
to Government Personnel

303.203

Reporting suspected violations of the Gratuities clause.

Subpart 303.3 • Reports of Suspected
Antitrust Violations

303.303

Reporting suspected antitrust violations.

Subpart 303.4 • Contingent Fees

303.408
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303.409

Evaluation of the SF 119.
Responsibilities.
Misrepresentations or violations of the Covenant
Against Contingent Fees.

Subpart 303.5 • Other Improper Business Practices

303.502

Subcontractor kickbacks.

Subpart 303.6 • Contracts with Government
Employees or Organizations
Owned or Controlled by Them

303.602

Exceptions.

Subpart 303.7 • Voiding and Rescinding Contracts

303.704

Policy.

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Subpart 303.1

Safeguards

303.101 standards of conduct.

303.101-3 Agency regulations.

The Department of Health and Human Services' Standards of Conduct are prescribed in Part 73 of Title 45.

Subpart 303.2

Contractor Gratuities **to** Government Personnel

303.203 Reporting suspected violations of the Gratuities
clause.

Departmental personnel shall report suspected violations **of**
the Gratuities clause in accordance with **Subpart M**, Reporting
Violations, of the Department's Standards of Conduct (**45** CFR
Part **73**) and General Administration Manual Chapter S-10, rather
than as specified in FAR 3.203. Refer to Subpart **E**, Gifts,
Entertainment, and **Favors**, of 45 CFR Part 73 for **an** explanation
regarding what is prohibited and what is permitted.

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Subpart 303.3

Reports of Suspected Antitrust Violations

303.303 Reporting suspected antitrust violations.

A copy of each report of suspected antitrust violations submitted to the Attorney General shall also be submitted to the
| **Director**, Office of Acquisition and Grants Management.

Subpart 303.4

Contingent Fees

303.408 Evaluation of the SF 119.

303.408-1 Responsibilities.

(a) Reserved.

(b) The chief ~~of~~ the contracting office shall perform the review required by FAR 3.408-1(b) and should consult with the Office of General Counsel, Business and Administrative Law Division, when deemed necessary.

303.409 Misrepresentations or violations of the Covenant Against Contingent Fees.

(a) Reports shall be made promptly to the contracting officer.

(b) (1)-(3) Reserved.

(4) Suspected fraudulent or criminal matters to be reported to the Department of Justice shall be prepared in letter format and forwarded through acquisition channels to the head ~~of~~ the contracting activity for signature. The letter must contain all pertinent facts and background information considered by the contracting officer and chief of the contracting office that led to the decision that fraudulent or criminal matters may be present. A copy of the signed letter shall be sent to the Director, Office of Acquisition and Grants Management.

Subpart 303.5

Other Improper Business Practice⁶

303.502 Subcontractor kickbacks.

(a) Reserved.

(b) Any known or suspected violations of the Anti-Kickback Act (41 U.S.C. 51-54) shall be reported to the contracting officer who shall investigate the matter, document the findings, and report the results to the chief of the contracting office. If the results substantiate the known or suspected violation, the chief of the contracting office shall notify the Office of General Counsel, Business and Administrative Law Division and report the matter, through acquisition channels, to the head of the contracting activity. The head of the contracting activity shall take appropriate action in consonance with the Act, and notify the Director, Office of Acquisition and Grants Management of the case and its disposition.

Subpart 303.6

Contracts with Government Employees or
Organizations Owned or Controlled by Them

303.602 Exceptions.

Approval **of** an exception to the policy stated in FAR 3.601 shall be made by the head of the **OPDIV** (Assistant Secretary for Management and Budget in OS cases) **or** the Regional Director.

Subpart 303.7

Voiding and Rescinding Contracts

303.704 **Policy.**

For purposes of **implementing** FAR Subpart 3.7, the authorities granted to the "agency head or designee" shall be exercised by the **principal** official responsible for **acquisiton**.

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Part 304

Administrative Matters

Subpart 304.1 - Contract Execution

Section
304.101

Contracting officer's signature.

Subpart 304.2 - Contract Distribution

304.201

Procedures.

Subpart 304.6 - Contract Reporting

304.602

Federal Procurement Data System.

Subpart 304.8 - Contract Files

304.801

General.

304.804

Closeout of contract files.

304.804-1

Closeout by the office administering the contract.

304.870

Closing review.

Subpart 304.70 - Acquisition Instrument
Identification Numbering System

304.7000

Scope of subpart.

304.7001

Numbering contracts.

304.7002

Numbering solicitation documents.

304.7003

Numbering purchase and delivery orders.

304.7004

Numbering basic agreements.

304.7005

Numbering basic ordering agreements.

Subpart 304.71 - Review and Approval of Proposed
Contract Awards

304.7100

Scope of subpart.

304.7101

Contracts requiring review and approval.

304.7102

Conduct of the review.

304.7103

Approvals.

Subpart 304.1

Contract Execution

304.101 Contracting officer's signature.

An original **of** each bilateral contract or modification shall be executed by the contractor and contracting officer. An original of each unilateral contract or modification shall be executed by the contracting officer. The contracting officer need only sign the original when carbon paper is used in sets of forms such as Standard Form 44 or Optional Form 347 or 348. A legible carbon impression of the contracting officer's signature shall carry the same force and effect as a pen and ink signature for unilateral contracts.

Subpart 304.2

Contract Distribution

304.201 Procedures.

The signed original **of** bilateral contracts **and** modifications shall be placed **in** the contract file, **and** duplicate originals shall be furnished the contractor, **the appropriate** accounting point, the project officer, and other Individuals **or** offices, as applicable. Purchase orders, **delivery orders**, and other unilateral contracts and modifications shall be distributed the **same as bilateral contracts except** the original shall be furnished the contractor or seller. Copies **of** unilateral **contracts** and modifications with carbon impressed signatures may be used but must be stamped **"DUPLICATE ORIGINAL"** (See 304.101.)

Subpart 304.6

Contract Reporting

| 304.602 Federal Procurement Data System.

The Department-wide Contract Information System (**DCIS**) represents the Department's implementation of the FPDS. All departmental contracting activities are required to participate in the **DCIS** and follow the procedures stated in the Contract Information System Manual and amendments to it. The principal official responsible for acquisition shall ensure that all required contract information is collected, submitted, and received into the **DCIS** on or before the 15th of each month for all appropriate contract and contract modification awards of the prior month.

Subpart 304.8

Contract Files

304.801 General.

OPDIVs shall prescribe the contents of contract files and establish filing procedures consistent with the nature of the contracting actions and in accordance with FAR 4.801, 4.802, and 4.803. Contract files should contain an index of the contents to facilitate review and should be separated into logical categories (see FAR 4.803).

304.804 Closeout of contract files.

304.804-1 Closeout by the office administering the contract.

(a)(1) and (2) [Reserved].

(3) Files for all cost-reimbursement type contracts should be closed within 20 months of the month in which the contracting officer receives evidence of physical completion (see FAR **4.804-4**). The contracting officer responsible for contract closeout may negotiate settlement of indirect costs for a specific contract, in advance of the determination of final indirect cost rates in accordance with FAR 42.708.

304.870 Closing review.

(a) Contracting officers shall assure the applicable items in FAR 4.804-5, other than a field audit, have been accomplished prior to closing any physically completed contract. **Cost-**reimbursement type contracts will be subject to the additional requirements set forth below before they may be closed.

(b) Contracting officers shall use the instructions in the October 5, 1982 memorandum from the Deputy Assistant Secretary for Procurement, Assistance and Logistics to closeout **cost-**reimbursement type contracts physically completed prior to fiscal year 1977 and cost-reimbursement type contracts completed subsequent to that date for which field audit information is available.

(c) Contracting officers shall closeout all other **cost-**reimbursement type contracts physically completed after September 30, 1977 in accordance with the following procedures:

Contract Files

(1) Field audits will be conducted for contracts in excess of \$500,000 awarded to commercial organizations and non-profit organizations other than colleges and universities, hospitals and State and local units of government for which an agency other than HHS has audit cognizance. Field audits will also be conducted each year on approximately 25 of the same type contractors for which HHS has audit cognizance. These contracts may be closed after receipt of the field audit report.

(2) Contracts of any dollar value with non-proprietary colleges and universities, hospitals and State and local units of government and contracts not in excess of \$500,000 with other institutions/organizations shall be closed out on the basis of a desk audit. The desk audit should include (i) a confirmation from the project officer that labor, material, travel, and other types of direct costs are commensurate with contract requirements, (ii) a review of available audit reports to determine if any adjustments were made that may be applicable to the contract under review, and (iii) discussions with the cognizant government auditor when considered appropriate. These contracts shall be closed with the condition that they are subject to adjustment should an on-site audit be conducted at a later date and should unallowable costs be identified as a result of that audit. The release executed by the contractor shall contain the following:

The Contractor agrees, pursuant to the clause in this contract entitled Allowable Cost (for cost-reimbursement contracts) or Allowable Cost and Fixed Fee (for CPFF contracts), that the amount of any sustained audit exceptions resulting from any audit made after final payment will be refunded to the Government.

(3) The contracting officer may request a field audit of any contract when, in his/her judgment, the risk attendant with the contract warrants it. The contracting officer, however, shall exercise discretion in requesting such audits on creditable evidence such as unsatisfactory dealings with the contractor during the period of contract performance, prior audit reports containing serious findings against the contractor, the known experience of other government officials in dealing with the contractor when the contracting officer is personally knowledgeable about the circumstances, formal third party complaints or allegations which bear upon the contractor's integrity or the

Contract Files

propriety of costs charged to the Government, and other comparable allegations or advice of a derogatory nature about the contractor made by reasonable individuals which in the contracting officer's judgment should be investigated. Except where a contracting officer suspects misrepresentation or fraud, audits should not be requested if their cost of performance is likely to exceed their potential cost recovery.

(4) When an audit is warranted prior to closing out a contract, the contracting officer should request the audit directly from the Department of Health and Human Services Office of the Inspector General, Office **of** Audits (HHSOA). The request should cite the reasons the contracting officer believes an audit is warranted. A copy of the request should be forwarded to the Director, Office of Acquisition and Grants Management (DOAGM). In the event the Office of the Inspector General cannot honor the request in a reasonable period of time, it will consult with DOAGM and the contracting officer. The final decision on the need and scope of an audit will be made on the basis of the value of the contract, the nature of the contracting officer's concerns, and the availability of HHSOA or other existing resources in the Department to perform a review to satisfy the contracting officer's concerns.

(5) Closeout procedures are to be followed in conjunction with the regular procedures now followed in administering contracts. These procedures are not meant or to be interpreted as imposing any requirement or responsibility on contracting officials **not** currently required by the FAR. With some rare exceptions, Standard Form 1034, Public Voucher for Purchases and Services Other than Personal, will contain sufficient information to allow a contracting officer to satisfy requirements for desk audits. Accordingly, these closeout procedures shall not cause contracting officers to engage in extraordinary oversight or review and shall not be used by contracting officers as the basis for requiring contractors to submit extraordinary documentation such as payroll listing, labor billings, travel details, etc.

Subpart 304.70

Acquisition Instrument Identification
Numbering System

304.700 Scope of subpart.

This subpart prescribes policy and procedures for assigning identifying numbers to contracts and related instruments, including solicitation documents, purchase orders, and delivery orders.

304.7001 Numbering contracts.

(a) Contracts which require numbering. The following contracts shall be numbered in accordance with the system prescribed in paragraph (b) of this section:

(1) All contracts, including letter contracts and task orders under basic ordering agreements, which involve the payment of \$2,500 or more **for** the acquisition of personal property or nonpersonal services.

(2) All contracts which involve the payment of \$2,000 or more for construction (including renovation or alteration).

(3) All contracts which involve more than one **payment** regardless **of** amount.

(The number assigned to a letter contract shall be assigned to the superseding definitized contract.)

(b) Numbering system All contracts which require numbering shall be assigned a number consisting of the following:

(1) The three digit code assigned to the contracting office by the Office of Financial Operations, Office of Finance:

(2) A two digit fiscal year designation: and

(3) A four digit **serial** number.

While it is required that a different series of four digit serial numbers be used for each fiscal year, serial numbers assigned need not be sequential.

Acquisition **Instrument** Identification
Numbering System

(c) Illustration of contract numbers. The initial contract executed by the Division of Contract Operations, Office of the Secretary, for fiscal year 1983 should be numbered 100-83-0001, the second contract 100-83-0002. Alternatively, if it **is** desirable for internal identification purposes to establish separate series **of** numbers for sealed bid and negotiated **contracts**, this procedure is permissible. In this instance, the initial sealed bid contract might be numbered 100-83-0001 and the initial negotiated contract numbered 100-83-0500.

(d) Assignment of identification codes. Each contracting office of the Department shall be assigned **a three** digit identification code by the Office of Financial Operations. Requests for the assignment of such codes for newly established contracting offices shall be submitted by the headquarters acquisition staff office of the contracting activity to the Office of Financial Operations. Conversely, in the event that a contracting office is to be disestablished, the Office of Financial Operations shall be notified. A listing of the contracting office identification codes currently in use is contained in the Department-wide Contract Information System Manual (DCIS).

304.7002 Numbering solicitation documents.

Requests for proposals and invitations for bids shall be numbered **in** accordance with procedures prescribed by the headquarters staff office of the contracting activity.

304.7003 Numbering purchase and delivery orders.

Contracting offices shall establish procedures for numbering purchase orders as required for effective identification and control.

304.7004 Numbering basic agreements.

Basic agreements shall be numbered in accordance with procedures prescribed by the headquarters staff office of the cognizant contracting activity. However, individual contracts **entered** into pursuant to the terms and conditions of a basic agreement shall be numbered in accordance with **304.7001(b)**.

Acquisition Instrument Identification
Numbering System

304.7005 Numbering basic *ordering agreements*.

Basic ordering agreements shall be numbered in accordance with procedures prescribed by-the headquarters staff office of the contracting activity.

Subpart 304.71

Review and Approval of
Proposed Contract Awards

304.7100 Scope of subpart.

This subpart prescribes review and approval procedures for contract actions to ensure that:

(a) Contract awards are in conformance with law, established policies and procedures, and sound business practices;

(b) Contractual documents properly reflect the mutual understanding of the parties; and

(c) The contracting officer is informed of deficiencies and items of questionable acceptability and corrective action is taken.

304.7101 Contracts requiring review and approval.

(a) General. All contractual documents, regardless of dollar value, are to be reviewed by the contracting officer prior to award, even if the review and approval procedures prescribed in this section are applicable. However, under no circumstances may the individual who signs a contract instrument as contracting officer perform final review and approval of that contract action if it, or any modification to it, is expected to exceed the levels set forth in (b)(1) or **(2)**, below.

(b) Required reviews and approvals.

(1) Officials responsible for the acquisition function in the Office of the Secretary, **OPDIVs** (except the Public Health Service), and regional offices are to assure that sealed bid or negotiated contracts, and/or modifications to them, expected to exceed \$300,000, are reviewed and approved prior to award. In order to **assure** the propriety of smaller dollar acquisitions, a statistically significant sample of contract actions not expected to exceed \$300,000 are to reviewed and approved prior to award.

(2) Contract actions of the Public Health Service are to be reviewed and approved prior to award in accordance with the dollar thresholds stated in Subpart **PHS** 304.71. In order to

Review and Approval of
Proposed Contract Awards

assure the propriety of small dollar acquisitions, a statistically significant **sample of** contract actions not expected to exceed those dollar thresholds referenced in Subpart PHS 304.71 are to be reviewed and approved prior to award.

(c) **Reviewing officials.** Officials assigned responsibility for review and approval **of contract actions** must possess **qualifications** in the **field of acquisition** commensurate with the level of review performed, and, as a minimum, possess those acquisition skills expected of a contracting officer. The following officials are responsible for preaward contract review and approval:

Office of the Secretary	Director, Division of Contract Operations
Office of Human Development Services	Director, Grants and Contract management Division
Social Security Administration	Director, Office of Acquisition and Grants (may be redelegated to the appropriate division director within the Office of Acquisition and Grants)
Health Care Financing Administration	Director, Division of procurement Services
Public Health Service	The reviewing official is designated in Subpart PHS 304.71, as approved by the Director, Office of Acquisition and Grants Management.

However, if **any** of the officials **are** to serve as the contracting officer **and** sign the contractual document, the review and approval function shall be performed by **an** appropriate official at least one level above.

Review and Approval of
Proposed Contract Awards

(d) Regional offices. The Director, Regional Administrative Support Center (**RASC**) is responsible for review and approval of contracts, or modifications to them, expected to exceed 6300,000 and executed by the regional office's contracting staff. The RASC may obtain the advice of the Regional Attorney in the review of proposed contract awards.

304.7102 Conduct of the review.

(a) General. Reviewing officials may solicit the participation of specialists in various technical and administrative disciplines to aid in the review. The method of the review is not prescribed here in order to permit discretionary judgment in determining the depth to which significant areas are to be examined.

(b) Contract file. The reviewer is to: (1) Determine that the contract file constitutes an independent record, documented to provide a complete chronology of actions related to all aspects of the acquisition, and that the documentation is consistent with the requirements of FAR 4.803;

(2) Determine that each contract file contains documentation or other data (i.e., technical and business management evaluation, cost advisory and audit reports, negotiation memorandum, etc.) sufficient to explain and support the rationales, judgments, and authorities upon which all decisions and actions were predicated; and

(3) Ascertain:

(i) If the proposed acquisition action is to be awarded by other than full and open competition, that the documentation and approvals supporting the decision are present in the contract file;

(ii) That proper publicizing of the proposed acquisition was made pursuant to FAR Part 5;

(iii) That approval was obtained for any deviation from prescribed contract clauses;

Review and Approval of
Proposed Contract Awards

(iv) That sufficient competition was obtained, **the competitive** range was appropriately determined, and oral or written discussions were conducted with all **firms** in the **competitive** range;

(v) That all the rules set forth in FAR Part **14** were **complied** with when the proposed award is a result of an IFB; and

(vi) That appropriate determinations and findings which justify the type of contract and advance payments are a part of the contract file.

304.7103 Approvals.

(a) Awards are not to be made until approval is granted by the reviewing official identified in 304.7101. All approvals are to be in writing, except that when time is of the essence approval may be given orally and subsequently **confirmed** in writing.

(b) The reviewing **official** shall not approve a proposed contract award if a substantive issue (or issues) remains to be resolved. However, in appropriate circumstances, the reviewing official may use discretion and grant approval on a conditional basis and require the contracting officer to submit follow-up written documentation that the substantive issue has been resolved. This provides the reviewing official the option to require the contracting officer to resolve the substantive issue and submit documenting evidence before award approval is **given**, or to grant conditional approval providing the substantive issue is resolved before the contract is awarded and require the contracting officer to submit documenting evidence either before or after the award. The reviewing official also has the option to determine the extent of documentation evidence to be submitted by the contracting officer. This may range from complete resubmission of the contract file to submission of a memorandum stating the contracting officer's actions in resolving the substantive issue.

Part 305

Publicizing Contract Actions

Subpart 305.2 - Synopsis of Proposed Contract
Actions

Section
305.202

Exceptions

Subpart 305.3 - Synopses of Contract Awards

305.303

Announcement of contract awards.

Subpart 305.5 - Paid Advertisements

305.502
305.503

Authority.
Procedures.

Subpart 305.2

Synopsis of Proposed Contract Actions

305.202 Exceptions.

(a) Reserved.

(b) When a contracting office believes that it has a situation where advance notice is not appropriate or reasonable, it shall prepare a memorandum citing all pertinent facts and details and send it, through normal acquisition channels, to the Director, Office of Acquisition and Grants Management (DOAGM) requesting relief from synopsisizing. The DOAGM shall review the request and decide whether an exception to synopsisizing is appropriate or reasonable. If it is, the DOAGM shall take the necessary coordinating actions required by FAR 5.202(b). Whatever the decision is on the request, the DOAGM shall promptly notify the contracting office when a determination has been made.

Subpart 305.3

Synopses of Contract Awards

305.303 Announcement of contract awards.

(a) Public announcement. Any contract, contract modification, or delivery order in the amount of \$1 million or more shall be reported by the contracting officer to the Office of the Deputy Assistant Secretary for Legislation (Congressional Liaison), Room **406G**, Hubert H. Humphrey Building. Notification shall be accomplished by providing a copy of the contract or award document face page to the referenced office prior to the day of award, or in sufficient time to allow for an announcement to be made by 5:00 p.m. Washington, DC time on the day of award.

Subpart 305.5

Paid Advertisements

305.502 Authority.

The contracting officer is authorized to publish advertisements, notices, and contract proposals in newspapers and periodicals in accordance with the requirements and conditions referenced in FAR Subpart 5.5.

305.503 Procedures.

Requests for acquisition of advertising shall be accompanied by written authority to advertise or publish which sets forth justification and includes the names of newspapers or journals concerned, frequency and dates of proposed advertisements, estimated cost, and other pertinent information. Paid advertisements shall be limited to the publication of essential details of grant announcements, invitations for bids, and requests for proposals, including those for the sale of personal property, and for the recruitment of employees.

Part 306

Competition Requirements

Subpart 306.2 • Full and Open Competition After Exclusion
of Sources

Section

306.202

Establishing or maintaining alternative sources.

Subpart 306.3 • Other Than Full and Open Competition

306.302

Circumstances permitting other than full and open
competition.

306.302-1

Only *one* responsible source and no other supplies or
services will satisfy agency requirements.

306.302-7

Public interest.

306.303

Justifications.

306.303-1

Requirements.

306.303-2

Content.

306.304

Approval of the justification.

Subpart 306.4 • Sealed Bidding and Competitive Proposals

306.401

Sealed bidding and competitive proposals.

Subpart 306.5 • Competition Advocates

306.501

Requirement.

306.502

Duties and responsibilities.

Subpart 306.2

Full and Open Competition After Exclusion of Sources

306.202 **Establishing** or maintaining al **ternative** sources.

(a) The reference to the agency head in FAR **6.202(a)** shall mean the appropriate competition advocate cited in 306.501.

(b)(1) The required determination and findings (**D&F**) shall be prepared by the contracting officer based on the data provided by program personnel, and shall be signed by the appropriate competition advocate. The D&F signatory authority is not delegable.

Subpart 306.3

Other Than Full and Open Competition

306.302 Circumstances permitting other than full and open competition.

306.302-1 Only one responsible source and no other supplies or services will satisfy agency requirements.

(a)(1) - (2)(i) Reserved.

(2)(ii) Follow-on contracts for the continuation of major research and development studies on long-term social and health programs, major research studies, or clinical trials may be deemed to be available only from the original source when it is likely that award to any other source would result in unacceptable delays in fulfilling the Department's **or OPDIV's** requirements.

(b) Application. (1) - (3) Reserved.

(4) When the OPDIV head has determined that a specific item of technical equipment or parts must be obtained to meet an activity's program responsibility to test and evaluate certain kinds and types of products, and only one source is available. (This criterion is limited to testing and evaluation purposes only and may not be used for initial outfitting or repetitive acquisitions. Project officers should support the use of this criterion with citations from their agency's legislation and the technical rationale for the item of equipment required.)

(c) Application for brand name descriptions. There is existing equipment which, for reasons of compatibility and interchangeability, requires an item which is manufactured only by **one** source. (This criterion is for **use** in acquisitions where a particular brand name item is required, and an **"or equal"** will not meet the Government's requirements. This criterion may not be used when there are other manufacturers available which may be able to produce acceptable items even though their products might require some adjustments and modifications. These other manufacturers must be given the opportunity to compete.)

306.302-7 Public interest.

(a) Authority. (1) Reserved.

(2) Agency head, in this instance, means the Secretary.

Other Than Full and Open Competition

(b) Reserved.

(c) **Limitations.** When using the authority cited in FAR 6.302-7(a)(1), the Secretary's approval must be obtained. Therefore, an "approval package" must be prepared and staffed through departmental acquisition channels to the Secretary. The package shall include:

(1) A determination and findings, prepared by the contracting officer, **for** the Secretary to sign.

(2) A **letter** for the Secretary to sign notifying Congress of the determination to award a contract under the authority of 41 U.S.C. 253(c)(7). This letter must be received by Congress at least 30 days before contract award.

(3) A "Justification for Other Than Full and Open Competition" (JOFOC).

(4) A briefing paper presenting background, need, etc.

(5) Any other pertinent papers or documents required by the Department.

306.303 Justifications.

306.303-1 Requirements.

(a) Reserved.

(b) Preliminary arrangements or agreements with the proposed contractor made by someone other than the contracting officer shall have no effect on the rationale used to support an acquisition for other than full and open competition.

(c) - (e) Reserved.

(f) The program office should discuss prospective other than full and open competition requests with their supporting contracting office as early as possible during the acquisition planning stage (see FAR Subpart 7.1 and Subpart **307.1**), and before submitting the requisition or request for contract. The discussions may resolve uncertainties, provide program offices with names of other sources, allow proper scheduling of the acquisition, and avoid delays which might otherwise occur should it be determined that the request for other than full and open competition is not justified.

Other Than Full and Open Competition

(g) When a program office desires to obtain certain goods or services by contract without full and open competition, it shall, at the time of forwarding the requisition or request for contract, furnish the contracting office a justification explaining why full and open competition is not feasible. All justifications shall be initially reviewed by the contracting officer.

(1) Justifications in excess of the small purchase limitation shall be in the form of a separate, self-contained document, prepared in accordance with FAR 6.303 and 306.303, and called a **"JOFOC"** (Justification for Other Than Full and Open Competition). Justifications of the small purchase limitation or less may be in the form of a paragraph or paragraphs contained in the requisition or request for contract.

(2) Justifications, whether over **or** under the small purchase limitation, shall fully describe what is to be acquired, offer reasons which go beyond inconvenience, and explain why it is not feasible to obtain competition. The justifications shall be supported by verifiable facts rather than mere opinions. Documentation in the justification should be sufficient to permit an individual with technical competence in the area to follow the rationale.

306.303-2 Content.

(a)(1) The program office and name, address, and telephone number of the project officer shall also be included.

(2) This item shall include project identification such as the authorizing program legislation, to include citations or other internal program identification data such as title, contract number, etc.

(3) A full description of the requirement and its dollar amount is to be included. It may be in the form of a statement of work, purchase description, or specification. A statement is to be included to explain whether the acquisition is an entity in itself, whether it is one in a series, or part of a related group of acquisitions.

(b) Reserved.

(c) Each JOFOC shall conclude with at least the following signatory lines (other concurrence lines may be added as deemed necessary by the contracting activity):

Other Than Full and Open Competition

Recommended _____ Date _____
Project Officer

Concur _____ Date _____
Project Officer's
Immediate Supervisor

Concur _____ Date _____
Contracting Officer

Approved _____ Date _____
Approving Official

306.304 Approval of the Justification.

(a)(1) For purchases in excess of 10 percent of the small purchase limitation but not over the small purchase limitation, the contracting officer is authorized to review and approve (or disapprove) the justification (see **313.106(c)(2)**). For acquisitions over the small purchase limitation, but not exceeding \$100,000, the JOFOC shall be submitted to the contracting officer for review. The contracting officer will either concur or nonconcur, and forward the JOFOC to the principal official responsible for acquisition for approval. (When the contracting officer and principal official responsible for acquisition are the same individual, the approval will be made by the respective official listed in 306.501.) The principal official responsible for acquisition may redelegate approval for acquisitions between the small purchase limitation and \$50,000 to the chief of the contracting office, provided that individual is at least one level above the contracting officer who will sign the contract.

(2) The competition advocates are listed in 306.501.

(3) The following shall serve as the approving officials referenced in FAR **6.304(a)(3)**:

HCFA - Administrator for Health Care Financing

OHDS - Assistant Secretary for Human Development **Services**

OS - Assistant Secretary for Management and Budget

PHS - Assistant Secretary for Health (may be delegated to the Deputy Assistant Secretary for Health Operations)

HHS Transmittal 85.01 (4/1/85)

Other Than Full and Open Competition

SSA - **Commissioner** of Social Security

RO's - Regional Director

This authority is not delegable, except as indicated for **PHS**.

(4) The senior procurement executive of the Department is the Assistant Secretary for Management and Budget.

(b) Reserved.

(c) A class justification shall be processed the same as an individual justification.

(d) The contracting officer who receives a JOFOC for processing shall, after ascertaining that the document is complete, request advice **from pricing** audit, legal, and other appropriate staff offices, and forward the JOFOC, with his or her concurrence or nonconcurrence, to the appropriate approving official. When the contracting officer does not concur with the JOFOC, a written explanation setting forth the reasons must be provided the approving official. If the JOFOC is disapproved by the approving official, the contracting officer shall **promptly** notify the concerned program office.

(e) It is the responsibility of the approving official to determine whether a contract may properly be awarded without full and open competition. The program office and project officer are responsible for furnishing the contracting officer and approving official with pertinent supporting information necessary to make such determinations. Other staff offices shall advise the contracting officer and approving official as requested.

(f) As each justification is **reviewed**, the approving official should ask: why the acquisition cannot be competed, are there sufficient grounds for excluding all other actual or potential sources, what actions can be taken to obtain full and open **competition** in the instant acquisition, and what actions are needed to avoid the need for a subsequent or continuing acquisition that is for other than full and open competition?

Subpart 306.4

Sealed Bidding and Competitive Proposals

306.401 Sealed bidding and **competitive** proposals.

The requirement in FAR 6.401 to document the reasons why sealed bidding is not appropriate may be **accomplished** by adding a sentence to the negotiation memorandum (see 315.672) specifying which criterion (or criteria) listed in FAR 6.401(a) is (are) not applicable to the acquisition.

Subpart 306.5

Competition Advocates

306.501 Requirement.

The Department's competition advocate is the Deputy Assistant Secretary for Management and Acquisition. The competition advocates for the Department's primary contracting offices are as follows:

HCFA - Associate Administrator for Management and Support Services

OHDS - Director, Office of Management Services

OS - Director, Office of Acquisition and Grants Management

OASH - Director, Administrative Services Center

ADAMHA - Associate Administrator for Management

AHCPR - Executive Officer, Agency for Health Care Policy and Research

CDC - Director, Office of Program Support

FDA - Associate Commissioner for Management and Operations

HRSA - Associate Administrator for Operations and Management

IHS - Associate Director, Office of Administration and Management

NIH - (R&D)--Associate Director for Extramural Affairs
(Other than **R&D**)-- Associate Director for Intramural Affairs

SSA - Deputy Commissioner for Management

RO's - Director, Regional Administrative Support Center

306.502 Duties and responsibilities.

(b) The competition advocates listed in 306.501 shall assist the Department's competition advocate, when requested, by providing data and reports to aid in the accomplishment of the duties required of the Department's competition advocate as stated in FAR 6.502(a).

Part 307

Acquisition Planning

Subpart 307.1 - Acquisition Plans

Section

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Subpart 307.1

Acquisition Plans

307.104 General procedures.

(a) The acquisition planning document is an **administrative** tool designed to enable the contracting **officer** and project officer to plan effectively for the **accomplishment** of an acquisition during a specified time **frame**. The acquisition planning document serves as an outline of the method by which the contracting officer expects to accomplish the acquisition task.

(b) Reserved.

(c) If the plan proposes using other than **full** and open competition, the plan shall also be coordinated with the chief of the contracting office, acting for the competition advocate.

307.104-1 Requirement for acquisition planning.

(a) The acquisition planning document is required for **all** new negotiated acquisitions which are expected to exceed \$100,000, except the following:

(1) Acquisition of architect-engineer services;

(2) Acquisitions of utility services where the services are available from only one source; and

(3) **Acquisitions** made from or through other Government agencies.

(b) An acquisition planning document is also required for all **two-**step sealed bid acquisitions expected to exceed \$100,000.

(c) The principal **official** responsible for acquisition shall prescribe acquisition planning procedures for:

(1) Negotiated acquisitions which are not expected to exceed **\$100,000;**

(2) Two-step sealed bid **acquisitions** which are not expected to exceed \$100,000; and

(3) All **other** sealed bid acquisitions regardless of **dollar** amount.

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(d) An acquisition planning document is not required for a contract modification which either exercises an option or adds funds to an incrementally funded contract, provided there is an approved acquisition planning document in accordance with 307.105 and there **is** no significant deviation from that plan.

307.104-2 Responsibilities for acquisition planning.

(a) Planning by program and staff activities. Whenever execution of a program or project requires the acquisition of property or services by contract, the program or project plan shall delineate all elements to be acquired by contract. The program or project plans must include a plan and time-frame for completion action.

(b) Planning for **acquisition** actions. Action should commence as early as possible to effect an orderly and balanced acquisition workload throughout a fiscal year. Project officers who expect to initiate acquisitions are required to discuss their requirements **with** the contracting officials who **will** be responsible for these acquisitions to compare current staff capabilities with anticipated requirements to achieve an even distribution of fiscal year workload consistent **with** program needs. These **discussions** should result in understandings on:

(1) The details of the **acquisition** plan;

(2) Schedule for the **completion** of the acquisition plan;

(3) Preliminary discussions on the work statement/specifications and appropriate evaluation **criteria**; and

(4) Preliminary discussions on the content and timing of the request for contract **(RFC)**.

(c) Planning by contracting activities. Contracting activities are required to coordinate with program and staff offices to ensure:

(1) Timely and comprehensive planning for acquisitions;

(2) Timely initiation of requests for contracts; and

(3) Instruction of program and staff offices in proper acquisition practices and methods.

Acquisition Plans

307.104-3 Preparation of acquisition plan.

(a) The acquisition planning document serves as an advance agreement between program and contracting personnel by outlining the methods of how and when the acquisition is to be accomplished. ~~It~~ serves to resolve problems early in the acquisition cycle thereby precluding delays in contract placement. It is developed prior to the preparation and submission of the formal request for contract to the contracting activity. (For detailed information concerning the request for contract, see Subpart 315.70.)

(b) The acquisition planning document shall be prepared jointly by the project officer and the contract negotiator or in accordance with procedures prescribed by the principal official responsible for acquisition.

307.105 Contents of written acquisition plans.

307.105-1 Format and content.

The Department does not prescribe a standard format for the acquisition planning document, but **recommends** the use of a format similar to what is provided in this section. The subject areas addressed in paragraphs (a) through (e) must be included in every acquisition planning document. An **OPDIV**, agency, or regional office contracting activity may prescribe a standard format for the acquisition planning document and may include additional subject areas that are pertinent to that activity's needs.

(a) Identification information. The contracting activity shall prescribe the information necessary for readily identifying a planned acquisition. The information may include items such as acquisition planning document number, request for contract number, public law, program or project officer, etc.

(b) Programmatic considerations.

(1) Description of the project/supplies/services. Include a brief description of the proposed project/supplies/services. Discuss a⁷⁷ anticipated future requirements related to the acquisition. Discuss any past, present or future interrelated projects.

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(2) Project funding. Include the **summary** of funds expected to be obligated for the entire project by fiscal years and phases. Include expenditures for previous years. Discuss the probability of obtaining future years funding and/or what specific managerial action can be taken to insure future funding (if applicable).

(3) Background and acquisition history. Provide a brief factual summary of the technical and contractual history of the supplies/services being acquired.

(4) Related projects, efforts undertaken to avoid **duplication of effort.** Discuss efforts made to determine if existing projects, supplies or materials will satisfy the requirement. Include any related in-house efforts, searches, and clearinghouse reviews made to avoid duplication of effort.

(5) Need for **project/supplies/services.** Discuss rationale for deciding on the need for the project/supplies/services.

(6) Special **program** clearances or approvals. Review 307.105-Z to determine which special program clearances or approvals are required. Specify clearances or approvals applicable to this acquisition.

(7) Phasing. Briefly describe discrete tasks or stages of **accomplishment** which could be susceptible to phasing. Describe criteria for evaluation of performance of each phase before proceeding to the next. (See **307.105-3(c)(3)** for a discussion on phasing.)

(8) Government furnished material/facilities. Indicate material and facilities that will be furnished to the contractor and any associated problems which may be encountered. Discuss possible inequities which may arise in furnishing the materials or facilities. Discuss screening efforts for availability through GSA excess property schedules.

(9) Discussion of project risk. Provide a discussion of major areas of project risk including technical, cost, and schedule risk. Describe what efforts are planned to reduce risk. If an **acquisition**, which is planned to be awarded using other than full and open **competition**, represents a significant portion of a proposed contractor's business, discuss the **impact** on technical capability, realism of schedule, changes in contractor workload and related cost impact.

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(10) Reporting/delivery requirements. Describe the basis for establishing the delivery/reporting requirements and include the anticipated deliverables and time(s) for delivery.

(11) Replication, dissemination, or use of the results. Discuss anticipated replication, dissemination, or use of the results. Describe user audience and their expected use. Include a description of the delivery system.

(12) Data, data rights, patents, copyrights. Discuss data to be developed. Specify data to be delivered and data to remain in the contractor's possession. Discuss how the data is to be used, maintained, disclosed and disposed of by the contractor. Discuss data subject to the Privacy Act or Confidentiality of Information clause. Discuss data to be delivered with limited rights, data where title would not vest in the Government, and anticipated copyrights or patents. Discuss whether or not the data will permit any follow-on acquisitions to be **competitive**.

(13) Post-award administration and monitoring. Detail milestones that require periodic evaluation of the contractor's progress. Discuss any formal management systems to be used to monitor the contractor. Discuss plans for post-award conference and site visits. Delineate the timing of the periodic status reports.

(14) Technical evaluation plans. Discuss the plans for technical evaluation of the proposal. Discuss whether non-Federal technical evaluators will review the proposals. Discuss potential conflict of interest situations.

(c) Acquisition approach.

(1) Proposed sources. Include sources or categories of sources (if apparent). Address the pertinent areas stated in FAR 7.105(b)(2).

(2) Contract type. Provide the rationale for recommendation of contract type.

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(3) Socioeconomic programs. Discuss preliminary liaison with the Small and Disadvantaged Business Utilization Specialist for review to determine requirements susceptible for the various socioeconomic acquisition programs; i.e., small business, disadvantaged business, or labor surplus area set-asides.

(4) Other considerations. as applicable.. Discuss special contract clauses and proposed HHSAR deviations, if required. Discuss circumstances such as the effect of a protest on a previous acquisition to this acquisition, special public law or regulatory requirements which place restrictions on this acquisition, and use of a special type of synopsis. Address planned preproposal conference, preaward survey and preaward site visits.

(d) Planning for the acquisition cycle.

(1) Scheduling considerations. The project officer and the contract negotiator shall establish realistic planned dates which meet the **program** needs for award to assure **timely** delivery or completion of the project. The following factors should be considered in planning realistic dates:

- (i) Individual project officer and contract negotiator workloads;
- (ii) Planned, extended absences from the office; and
- (iii) Schedules are in consonance with established office goals for overall orderly and balanced workloads.

(2) Acquisition planning schedule. The following acquisition planning schedule should be included in all plans to the extent the items are significant or appropriate to the acquisition. Additional items may be added as appropriate.

ACQUISITION PLANNING SCHEDULE

ACTIONS

DATE

Advance or sources sought synopsis released
Advance or sources sought synopsis closed
Synopsis evaluation received
Request for contract received

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Special program approvals received
Synopsis publicizing proposed acquisition released
Request for proposal released
Preproposal conference conducted
Proposals received
Technical evaluation received
Cost advisory or audit report received
Equal opportunity clearance obtained
Prenegotiation conference conducted
Negotiation completed
Contract document prepared
Contract approval completed
Contract released
Award

(e) Approvals. All acquisition planning documents shall be signed by the project officer and the contract negotiator. Acquisition planning documents for acquisitions estimated to be between \$100,000 and **\$1,000,000** shall be approved by the contracting officer. Acquisition planning documents for acquisitions estimated to be in excess of \$1 million shall be approved by the principal official responsible for acquisition or his/her designee. The designated official shall be in a position no lower than the level above the contracting officer. One copy of all acquisition planning documents shall be filed with the principal official responsible for acquisition or the designated official for planning purposes. The original acquisition planning document shall be retained in the contract file.

307.105-2 Special program clearances or approvals.

The following special program clearances or approvals should be reviewed for applicability to each planned acquisition. The ones which are applicable should be addressed in the acquisition planning document and immediate programmatic action should be initiated to obtain the necessary clearances or approvals.

(a) Clearances or approvals required to be completed and submitted with the request for contract (RFC).

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(1) Automatic data processing. All proposed acquisitions of automatic data processing hardware, software packages, and services, as well as telecommunications equipment, which exceed the dollar thresholds stated in Chapter 4-10 of the HHS Information Resources Management (IRM) Manual must be reviewed and approved by the Office of Information Resources Management (OIRM), OASMB-OS. (See HHS Information Resources Management Manual, Chapter 4-10; Title 41 CFR Chapter 201, and Subpart 339.70.)

(2) ADP systems security. All ADP systems regardless of dollar amount are required to have a Certification of ADP Systems Security Adequacy signed by the ADP system manager and the cognizant ADP systems security officer. (See HHS IRM Manual, Part 6 - ADP Systems Security, OMB Circular No. A-71, Transmittal Memorandum No. 1; and Subpart 339.70.)

(3) Advisory and assistance services. OPDIV and STAFFDIV heads and regional directors are responsible for review and approval of all proposed advisory and assistance services contracts and purchase orders. (See General Administration Manual Chapter 8-15.)

(4) Evaluation contracts. The Assistant Secretary for Planning and Evaluation (ASPE) must approve all evaluation projects for proposed solicitations, except those which have been included in research, demonstration, or evaluation plans previously approved by the ASPE.

(5) Commercial activities. (OMB Circular No. A-76). A request for contract (RFC) must contain a statement as to whether the proposed solicitation is or is not to be used as part of an OMB Circular No. A-76 cost comparison. (See General Administrative Manual (GAM) Chapter 18-10; FAR Subpart 7.3, Subpart 307.3; OMB Circular No. A-76.)

(6) Paid advertising. Paid advertisements, notices or contract proposals to be published in newspapers and periodicals may be authorized by the contracting officer (See FAR Subpart 5.5, Subpart 305.5; Title 7, Chapter 5-25.2, and the General Accounting Policy and Procedures Manual for Guidance of Federal Agencies.)

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(7) Printings. The acquisition of printing by contract is prohibited unless it is authorized by the Joint Committee on Printing of the U.S. Congress. Procedures to be followed are contained in the "Government Printing and Binding Regulations" and the HHS Printing Management Manual and FAR Subpart 8.8.

(8) Fraud, abuse and waste. All proposed acquisitions that concern the subjects of fraud, abuse and waste must be reviewed and approved by the Inspector General or Deputy Inspector General, and written approval from either must be included in the request for contract.

(9) Paperwork Reduction Act. Under the Paperwork Reduction Act of 1980 (Pub. L. 96-511), a Federal agency shall not collect information or sponsor the collection of information from ten or more persons (other than Federal employees acting within the scope of their employment) unless, in advance, the agency has submitted Standard Form 83, Request for OMB Review, to the Director of the Office of Management and Budget, and the Director has approved the proposed collection of information. Procedures for the approval may be obtained by contacting the OPDIV reports clearance officer. (See Title 5 CFR Part 1320 and General Administration Manual Chapter 10-20.)

(10) Contracts with federal employees. Contracts between the Government and Government employees or between the Government and organizations which are substantially owned or controlled by Government employees may not knowingly be entered into, except for the most compelling reasons (see FAR Subpart 3.6). Authority to enter into a contract with a Government employee or an organization substantially owned or controlled by a Government employee must be approved prior to award of the contract by either the Assistant Secretary for Management and Budget, the head of the OPDIV, or the regional director, or their designees. (See 45 CFR Part 73 and HHS Standards of Conduct.)

(11) Publications. All projects which will result in contracts which include publications require review and approval by the Office of the Assistant Secretary for Public Affairs (OASPA). Form HHS-615, Publication Planning and Clearance Request, should be forwarded to OASPA through the OPDIV public affairs officer. Publications are defined in the chapter on publications in the Public Affairs Management Manual.

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| (12) Public affairs services. Projects for the acquisition of public affairs services in excess of \$5,000 shall be submitted to the Office of the Assistant Secretary for Public Affairs (OASPA) for review and approval on Form HHS 524, Request for Public Affairs Service Contract.

| (13) Audiovisual (videotape and motion picture production). Any proposed acquisition of an audiovisual production requires the submission of a Standard **Form** 282, Mandatory Title Check, to the National Audiovisual Center (NAC). When the results of this title check have been reviewed by the project office and if a determination is made that existing materials are not adequate to fulfill the requirement, a statement to that effect shall be prepared by the project office. For acquisitions in excess of \$5,000, a copy of that statement, together with a Standard Form 202, Federal Audiovisual Production Report, and Form **HHS-524A**, Request for Audiovisual Material, shall be submitted through the OPDIV public affairs officer to the Office of the Assistant Secretary for Public Affairs (OASPA) for review and approval.

Following approval by OASPA, the SF 202 and the statement explaining why existing materials are insufficient will be forwarded to NAC by OASPA. An approved copy of **the** Form HHS-524A will be returned to the OPDIV for transmission to the contract negotiator.

All audiovisuals are required to be acquired under the Government-wide Contracting System for Motion Picture and Videotape Productions, unless they are included in the exceptions to the mandatory use of the uniform system. (See the Executive Agent for Government-Wide Contracting System for Audiovisual Productions' March 21, 1980 memorandum on Implementation of OFPP Policy Letter No. 79-4, November 28, 1979, Contracting for Motion Picture and Videotape Productions: HHS General Administration Manual Chapter 1-121.)

| (14) Privacy Act (P.L. 93-579). Whenever the Department contracts for the design, development, operation, or maintenance of a system of records on individuals on behalf of the Department in order to accomplish a departmental function, the Privacy Act is applicable. The

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program official, after consultation with the activity's Privacy Act Coordinator and the Office of General Counsel as necessary, shall include a statement in the request for contract as to the applicability of the Act. Whenever an acquisition is subject to the Act, the program official prepares a "system notice" and has it published in the Federal Register. (See HHS Privacy Act regulation, 45 **CFR 5b**; FAR Subpart 24.1 and Subpart 324.1.)

(b) Clearances or approvals required to be completed prior to contract award. All foreign research contract projects to be conducted in a foreign country and financed by HHS funds (U.S. dollars) must have clearance by the Department of State with respect to consistency with foreign **policy** objectives. This clearance should be obtained prior to negotiation. Procedures for obtaining this clearance are set forth in the HHS General Administration Manual, Chapter **20-60**.

307.105-3 Specification, purchase description and statement of work.

One of the most **important** parts of a contract is the description of the work to be done. The description of that work may be in the form of a specification, purchase description or statement of work. A brief reference to specifications and purchase descriptions is provided, although the nature of the work performed in this Department usually results in the development of work statements. The development of the **acquisition** planning document should result in sufficient information to readily develop the description of work, usually in the form of a statement of work.

(a) Specification. Specification is defined in FAR 10.001. Use of the specification is primarily limited to supply or service contracts where the material end item or service to be delivered is well defined by the Government.

(b) Purchase description. FAR 10.001 also contains the definition of purchase description.

(c) Statement of work.

(1) General. A statement of work differs **from** a specification and purchase description primarily in that it describes work or services to be performed in reaching an end result rather than a detailed, well defined description or specification of the end product. The statement of work may enumerate or describe the methods (statistical, clinical, laboratory, etc.) that will be used. However, it is preferable for the offeror to **propose** the method of performing the work. The statement of work should specify the desired results, functions, or end items without telling the offeror what has to be done to accomplish those results

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unless the method of performance is critical or required for the successful performance of the contract.

The statement of work should be clear and concise and must completely define the responsibilities of the Government and the contractor. The statement of work should be worded so as to make **more** than one interpretation virtually **impossible** because it has to be read and interpreted by persons of varied backgrounds; such -as attorneys, contracting personnel, cost estimators, accountants, scientists, sociologists, educators, functional specialists, etc.

If the statement of work does not state exactly what is wanted, or does not state it precisely, it will generate many contract management problems for both the project officer and the contracting officer.

Ambiguous statements of work can create unsatisfactory performance, delays, and disputes, and can result in higher costs.

(2) Term (level of effort) vs. completion work statement. Careful distinctions must be drawn between term (level of effort) statements of work, which essentially require the furnishing of technical effort and a report thereof, and completion type work statements, which often require development of tangible end items **designed** to meet specific performance characteristics.

(i) Term or level of effort. A term or level of effort type statement of work is appropriate to research where one seeks to discover the feasibility of later development, or to gather general information. A term or level of effort type statement of work may only specify that some number of labor-hours be expended on a particular course of research, or that a certain number of tests be run, without reference to any intended conclusion.

(ii) Completion. A completion type statement of work is appropriate to development work where the feasibility of producing an end item **is** already known. A **completion** type statement of work may describe what **is** to be achieved through the contracted effort, such as the development of new methods, new end items, or other tangible results.

(3) Phasing. Individual research, development, or demonstration projects frequently lie well beyond the present state of the art and entail procedures and techniques of great complexity and difficulty. Under these circumstances, a contractor, no matter how carefully selected, may be unable to deliver the desired result. Moreover, the job of evaluating the contractor's progress is often difficult. Such a contract is frequently phased and often divided into stages of accomplishment, each of which must be completed and approved before the

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contractor may proceed to the next. Phasing makes it necessary to develop methods and controls, including reporting requirements for each phase of the contract and criteria for evaluation of the reports submitted, that will provide, at the earliest possible time, appropriate data for making decisions relative to all phases.

A phased contract may include stages of accomplishment such as research, development, and demonstration. Within each phase, there may be a **number** of tasks which should be included in the statement of work.

When phases of work can be identified, the statement of *work will* provide for phasing and the request for proposals will require the submission of proposed costs by phases. The resultant contract will reflect costs by phases, require the contractor to identify incurred costs by phases, establish delivery schedules by phases, and require the written acceptance of each phase. The provisions of the Limitation of Cost clause shall apply to the estimated cost of each phase. Contractors shall not be allowed to incur costs for phases which are dependent upon successful completion of earlier phases until written acceptance of the prior work is obtained from the contracting officer.

(4) Elements of the statement of work. The elements of the statement of work will vary with the **objective, complexity**, site, and nature of the acquisition. In general, it should cover the following matters as appropriate.

(i) A general description of the required objectives and desired results. Initially, a broad, nontechnical statement of the nature of the work to be performed. This should summarize the actions to be performed by the contractor and the results that the Government expects.

(ii) Background information helpful to a clear understanding of the requirements and how they evolved. Include a brief historical summary as appropriate. Include pertinent legislative history, related contracts or grants, and the relationship to overall program objectives.

(iii) A detailed description of the technical requirements. A comprehensive description of the work to be performed to provide whatever details are necessary for prospective offerors to submit meaningful proposals.

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(iv) Subordinate tasks or types of work. A listing of the various tasks or types of work (it may be desirable in **some** cases to indicate that this is not all-inclusive). The degree of task breakout is directly dependent on the size and complexity of the work to be performed and the logical groupings. A single cohesive task should *not* be broken out merely to conform to a format. Indicate whether the tasks are sequential or concurrent for offeror planning purposes.

(v) Phasing. **When** phasing is applicable, describe in detail the work or effort required in each phase and the criteria for determining whether the next phase will take place. If one or more phases contain subordinate tasks or types or work, the preceding information in paragraph (iv) may be incorporated into this part.

(vi) Reference material. All reference material to be used in the conduct of the project, such as technical publications, reports, specifications, architect or engineering drawings, etc., that tell how the work is to be carried out must be identified. Applicability should be explained, and a statement made as to where the material can be obtained.

(vii) Level of effort. When a level of effort is required, the number and type of personnel required should be stated. If known, the type and degree of expertise should be specified.

(viii) Special requirements (as applicable). An unusual or special contractual requirement, which would impact on contract performance, should be included as a separate section. Such items could include required place(s) of performance or unusual travel requirements. Clearance requirements, such as forms clearance, should be addressed.

(ix) Deliverables reporting requirements. All deliverables and/or reports must be clearly and **completely** described. For example, in a Final Study Report it is **important** to indicate what areas the report should cover and the criteria for use in accepting the final report to determine if the contract objectives have been satisfied.

It is important to require the preparation and submission of progress reports (administrative, technical and financial) to reflect contractor certification of satisfactory progress. If possible, the reports should be coordinated in such a manner as to provide a correlation between costs incurred and the state of **completion**.

All delivery and reporting requirements shall include the quantities, the place of delivery, and time of delivery.

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307.170 Program training requirements.

(a) Chapter 8-95 of the General Administration Manual (**GAM**) addresses the general parameters for acquisition planning as stated in 307.104. In conjunction with the principles of proper acquisition planning, the Department has established training courses for program officials to promote expedient program management in the planning and other pertinent aspects of the acquisition process. Chapter 8-96 of the **GAM** sets forth specific training requirements for program officials as follows:

(1) All program personnel selected to serve as project officer for an **HHS** contract shall have successfully completed either the Department's appropriate "**Basic Project Officer**" course, or an equivalent course (see paragraph (b), below).

(2) At least fifty percent of the **HHS** program personnel performing the function of technical proposal evaluator on a technical evaluation team or panel for any competitively solicited **HHS** contract shall have successfully completed the appropriate "Basic Project Officer" course, or an equivalent course (see paragraph (b), below). This requirement applies to the initial technical proposal evaluation and any subsequent technical evaluations that may be required.

(b) Determination of course equivalency shall be made by the principal official responsible for acquisition of the cognizant contracting activity. The contracting officer is responsible for ensuring that the project officer and technical proposal evaluators have successfully completed the required training discussed in **307.170-2**.

307.170-1 Policy exceptions.

~~(a) Small contracting activities.~~ (1) Program personnel ~~de-ignated~~ to serve as project officers and technical proposal evaluators for contracts which originate in offices having a mission which only incidentally and infrequently involves the generation of contract requirements (i.e., normally less than three contract requirements per fiscal year and in an amount not exceeding \$100,000 per contract) are not required to have completed any of the referenced training courses, although completion of an appropriate "**Basic Project Officer**" is recommended.

(2) As a substitute for the training, contracting officers servicing these program offices are required to ensure, as a minimum, that program personnel designated to serve as project officers and technical proposal evaluators have read and studied

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I the "DHHS Project Officers* Contracting Handbook," and fully understand their responsibilities. The contracting officer shall require these program personnel to furnish written certification that they have fulfilled this requirement prior to discharging the duties of project officer or technical proposal evaluator.

(b) **Urgent requirements.** In the event there is an urgent requirement for a specific individual to serve as a project officer and that individual has not successfully completed the prerequisite training course, the principal official responsible for acquisition may waive the training requirement and authorize the individual to perform the project duties, provided that:

I (1) The individual first meets with the cognizant contracting officer to review the "DHHS Project Officers' Contracting Handbook," and to discuss the important aspects of the contracting - program office relationship as appropriate to the circumstances: and

| (2) The individual attends the next scheduled and appropriate "Basic Project Officer" course.

307.170-2 Training course prerequisites.

| (a) **Project officers.** (1) Newly appointed project officers, and project officers with less than three years experience and no previous related training, are required to take the appropriate "Basic Project Officer" course. (The grade level for project officers attending the course should be GS-7 and above). All project officers are encouraged to take the appropriate "Writing Statements of Work" course.

| (2) Project officers with more than three years experience, and project officers with less than three years experience who have successfully completed the appropriate basic course, are qualified (and encouraged) to take the "Advanced Project Officer" course.

| (3) Additional information on prerequisites for attendance of these courses may be found in the "DHHS Acquisition Training and Certification Handbook."

| (b) **Technical Proposal evaluators** Technical proposal evaluators, regardless of experience, are required to take the appropriate "Basic Project Officer" course. Upon successful completion of the basic course, it is recommended that they take the appropriate "Advanced Project Officer" course.

Subpart 307.3

Contractor Versus Government Performance

307.302 General.

(a) **GAM** Chapter 18-10, Commercial-Industrial Activities of the Department of Health and Human Services Providing Products or Services for Government Use, assigns responsibilities for making method-of-performance decisions (contract vs. in-house performance) to various management levels within the Department depending on the dollar amount of capital investment or annual operating costs. It also requires that each operating division (**OPDIV**), staff division (**STAFFDIV**) and regional office (**RO**) designate a "Commercial-Industrial Control Officer" (**CICO**) to be responsible for ensuring compliance with the requirements of the Chapter.

(d) Besides contracts with annual operating costs under \$100,000, contracts under an authorized **acquisition** set-aside for small business or labor surplus area concerns and contracts made pursuant to section 8(a) of the Small Business Act are exempted from the requirements of FAR Subpart 7.3, GAM Chapter 18-10, and OMB Circular No. A-76.

307.303 Determining availability of private commercial sources.

In accordance with the provisions of GAM Chapter 18-10, **OPDIVs**, **STAFFDIVs**, and **ROs** must prepare and maintain a complete inventory of all individual commercial or industrial activities, including those conducted under contracts in excess of \$100,000 annually. They must also conduct periodic reviews of each activity and contract in the inventory to determine if the existing performance, in-house or by contract, continues to be in accordance with the policy guidelines of GAM Chapter 18-10.

307.304 Procedures.

Contracting officers shall ensure that no acquisition action involving a commercial-industrial activity is initiated unless it is in compliance with the requirements of GAM Chapter 18-10. The contracting officer must check each request for contract expected to result in a contract in excess of \$100,000 to ensure that it contains a statement as to whether the proposed contract is or is not subject to review under GAM Chapter 18-10 requirements. If the contracting officer has any questions regarding the determination of applicability or nonapplicability,

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or if the required statement is missing, the program office submitting the request **for** contract should be contacted and the situation rectified. If the issue cannot be resolved with the program office, the contracting officer shall refer the matter to the CICO for a final determination. The principal official responsible for acquisition is responsible for ensuring that contracting activities **are** in full compliance with FAR Subpart 7.3.

307.307 Appeals.

The review and appeals procedures discussed in FAR 7.307 are addressed in GM Chapter **18-10**.

Subpart 307.70

Considerations in Selecting
an Award Instrument

307.7000 Scope **of** subpart.

This subpart provides guidance on the appropriate selection of award instruments consistent with the Federal Grant and Cooperative Agreement **Act of** 1977 (Public Law 95-224) and the **OMB** implementation of the Act as published in the Federal Register on August 18, 1978 (41 **FR** 36860). This subpart addresses acquisition relationships where the award instrument is the contract, and assistance relationships where the award instrument is either a **grant or cooperative** agreement.

307.7001 Applicability.

This subpart applies to the choice of award instrument - contract, grant, or cooperative agreement - for all program and individual transactions, except where specifically prohibited by law.

307.7002 Purpose.

This subpart provides **guidance to assist in the** determination of **whether to use the acquisition or assistance** process to fulfill program needs. The distinction between, **and use of**, grants and cooperative agreements **is not discussed in** detail. Detailed guidance may be found in Chapter 1-02 of the Grants Administration Manual.

307.7003 Distinction between acquisition **and** assistance.

(a) The Federal Grant and Cooperative Agreement **Act of** 1977 requires the use of contracts to acquire property or services for the direct benefit or use of the Government and grants or cooperative agreements to transfer money, property, services, or anything of value to recipients to accomplish a public purpose of support or stimulation authorized by Federal statute.

(b) A contract is to be **used as** the legal **instrument** to reflect a relationship between the Federal **Government** and a recipient whenever:

(1) The principal purpose of the instrument **is** the acquisition, by purchase, lease, **or** barter, of property or

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services for the direct benefit or use of the Federal Government: or

(2) The Department determines in a specific instance that the use of a type of contract is appropriate. That is, it is determined in a certain situation that specific needs can be satisfied best by using the acquisition process. However, this authority does not permit circumventing the criteria for use of acquisition or assistance instruments. Use of this authority is restricted to extraordinary circumstances and only with the prior approval of the Director, Office of Acquisition and Grants Management.

(c) A grant or cooperative agreement is to be used as the legal instrument to reflect a relationship between the Federal Government and a recipient whenever the principal purpose *of the* relationship is the transfer of money, property, services, or anything of value to the recipient to accomplish a public purpose of support or stimulation authorized by Federal statute.

(1) A grant is the legal instrument to be used when no substantial involvement is anticipated between the Department and the recipient during performance of the contemplated activity.

(2) A cooperative agreement is the legal instrument to be used when substantial involvement is anticipated between the Department and the recipient during performance of the contemplated activity.

(d) As a general rule, contracts are to be used for the following purposes:

(1) Evaluation (including research of an evaluative nature) of the performance of Government programs or projects or *grantee* activity initiated by the funding agency for its direct benefit or use.

(2) Technical assistance rendered to the Government, or on behalf of the Government, to any third party, including those receiving grants or cooperative agreements.

(3) **Surveys**, studies, and research which provide specific information desired by the Government for its direct activities,

Considerations **in** Selecting
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or for dissemination to the public.

(4) Consulting services or professional services of all kinds if provided to the Government **or**, on behalf of the Government, to any third party.

(5) Training projects where the Government selects the individuals or specific groups whose members are to be trained or specifies the content of the curriculum (not applicable to fellowship awards).

(6) Planning **for** Government use.

(7) Production **of** publications or audiovisual materials required primarily for the conduct of the direct operations of the Government.

(8) Design or development of items for Government use or pursuant to **agency** definition or specifications.

(9) Conferences conducted **on** behalf of the Government.

(10) Generation of management information or other data **for** Government use.

(e) As a general rule, grants **or** cooperative agreements are to be used for the following purposes:

(1) General financial assistance (stimulation **or** support) to eligible recipients under **specific** legislation authorizing the assistance.

(2) Financial assistance (stimulation or support) to a specific program activity eligible for assistance under specific legislation authorizing the assistance.

307.7004 Procedures.

(a) OPDIV, agency, and regional office program officials should use existing budget and program planning procedures to propose new activities and major changes in ongoing programs. It is the responsibility of these program officials to meet with the principal official responsible for acquisition and the principal grants management official, or their designees,

Considerations in Selecting
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to distinguish the relationships and determine whether award is to be made through the acquisition process or assistance process. This determination should be made prior to the time when the annual acquisition **plan** is reviewed and approved so that the plan will reflect all known proposed contract actions. The cognizant contracting officer will confirm the appropriateness of the use of the contract instrument *when* reviewing the **request** for contract.

(b) Shifts from one award instrument to another must be fully documented in the appropriate files to show a fundamental change in program purpose that unequivocally justifies the rationale for the shift.

(c) **OPDIVs**, *agencies*, and regional offices must ensure that the choice of instrument is determined in accordance with the Federal Grant and Cooperative Agreement Act of 1977 and applicable departmental policies. If, however, there are major individual transactions or programs which contain elements of both acquisition and assistance in such a way that they cannot be characterized as having a principal purpose of one or the other, guidance should be obtained **from** the Director, Office of Acquisition and Grants Management, through normal channels, before proceeding with a determination.

(d) Any public notice, program announcement, solicitation, or request for applications or proposals must indicate whether the intended relationship will be one of acquisition or assistance and specify the award instrument to be used.

Subpart 307.71

Phase IX - Advance Acquisition
Planning (Scheduling)

307.7101 Background.

(a) Failure to properly plan individual acquisitions and failure to schedule the overall acquisition workload of an office, agency, or OPDIV tends to result in an inordinate percentage of contract awards being made in the closing weeks and even days of the fiscal year. This phenomenon, variously identified as **"The September Rush"**, **"Hurry-up Spending"**, **"End-of-Year Purchasing"**, and **"Year-End Spending Abuses"**, in turn fosters rushed, other than full and open competition, inadequately documented, and potentially wasteful acquisitions. Excessive year-end spending also invites increased intervention and/or scrutiny from Congress, the Office of Management and Budget, and the media. The end of the fiscal year, however, is usually too late to take corrective actions that are effective without being unduly damaging to necessary programs. The key is to begin advance acquisition planning far earlier.

(b) To avoid the historic pattern of wasteful and unnecessary year-end spending, the Department introduced the Acquisition Planning Initiative by Under Secretarial memorandum of February 19, 1980, Subject: New Procedures to Improve Planning and Scheduling of Contract Awards and Curb Last-Minute Year-End procurement Spending. Phase II of this initiative, beginning with Fiscal Year 1981, established the present acquisition planning mechanism. Basic guidance on the Phase II mechanism is contained in the **ASMB** memorandum of March 28, 1980, Subject: Phase II of (FY '81) Procurement Planning Initiative - Guidelines for Program Funding Milestones. For the public Health Service, the above guidance is supplemented by the **ASMB** memorandum of April 21, 1982, Subject: Phase II Annual Procurement Planning.

307.7102 Accountability and responsibility.

Phase II is a Department-wide monitoring and accountability system that requires early planning of acquisition requirements down to the individual project level. The Phase II mechanism includes the following:

(a) Accountability lies with the OPDIV and STAPFDIV heads who are required to coordinate overall schedules which plot the planned distribution of **RFC deliveries** and contract awards over an eighteen month **timeline** extending to fiscal year-end.

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Planning (Scheduling)

(b) Each OPDIV and STAFFDIV retains the flexibility to schedule individual RFC deliveries and contract awards as desired, so long as the overall schedule presents a relatively even distribution of contract awards and workload across the fiscal year.

(c) The schedules are updated quarterly to compare actual versus planned progress and, when necessary, to revise the schedules for the remainder of the fiscal year.

(d) Project officers are responsible for initiating the project planning by coordinating with contracting activities prior to RFC preparation, and taking the lead in developing acquisition plans that establish the date(s) for delivering complete RFC packages to the contracting activity, and that establish the planned award dates **for** individual projects.

(e) The Director, Office of Acquisition and Grants Management monitors the OPDIV and STAFFDIV Phase II plans throughout the year to assure that an even distribution of awards, dollar obligations, and workload is maintained.

307.7103 Purpose.

The Phase II **Advance** Acquisition Planning mechanism serves to avoid excessive year-end spending and distribute the contract workload as evenly as possible over the fiscal year, and provide a mechanism for planning at the program/acquisition operational level and a management tool for monitoring at the program, OPDIV, and departmental levels.

307.7104 Contracting activity actions.

The contracting activity shall take the following actions:

(a) Advise program and staff personnel of their responsibilities to ensure that:

(1) Year-end acquisitions of unplanned items are not entered into to use available balances of expiring appropriations (which would otherwise revert to the Treasury):

(2) Orders for supplies, materials, and equipment are kept to the minimum needed to carry on approved programs.

(3) Inventories are held to normal levels: and

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(4) New contracts for future services and payments to contractors are made only in accordance with established plans.

(b) Determine closing dates for purchases to be made from appropriations ending on September 30.

(c) **Expedite** the preparation and processing of determinations and findings which require the approval of the Assistant Secretary for Management and Budget or the **OPDIV** head.

Part 309

Contractor Qualifications

Subpart 309.1 Responsible Prospective Contractors

Section

309.104 Standards
309.104-1 general standards.
309.105 Procedures.
309.105-1 Obtaining information.

Subpart 309.4 • Debarment, Suspension, and Ineligibility

309.403 Definitions.
309.404 Consolidated List of Debarred, Suspended
and Ineligible Contractors.
309.405 Effect of listing.
309.405-1 Continuation of current contracts.
309.406 Debarment.
309.406-3 Procedures.
309.407 Suspension.
309.407-3 Procedures.
309.470 Reporting of suspected causes for debarment,
suspension, or the taking of **evasive** actions.
309.470-1 Situations where reports are required.
309.470-2 Contents of reports.

Subpart 309.1

Responsible Prospective Contractors

309.104 Standards.

309.104-1 General standards.

(a) In determining the adequacy of a prospective contractor's financial **resources** for the performance of the proposed contract, particular attention shall **be given to the ability** of the contractor to discharge its full financial responsibility for charges and losses of Government-furnished material, when the contractor has responsibility for such material.

(b) - (d) Reserved.

(e) The prospective contractor must have an established system of accounting and financial controls which are determined by the contracting **officer** to **be** adequate to permit the effective administration of the type of contract proposed, particularly if under its terms the costs incurred **are a** factor in determining the amount **payable under** the contract, or if advance or progress payments are requested.

309.105 Procedures.

309.105-1 Obtaining information.

(a) Reserved.

(b) (1) **Reserved.**

(2) (i) Reserved.

(ii) To ensure that a prospective contractor has **the necessary** accounting and operational controls (see **309.104-1(e)**), a written determination **must** be made **by** the contracting officer that the prospective contractor **has an** adequate accounting **system for** determining costs applicable **to** the contract and a billing system that **satisfies** the contractual payment **provisions**. The determination must explain the basis **for** this judgment,

(A) When dealing with high risk organizations, i.e., new organizations, those with known problems, and those with accounting **system** deficiencies, the contracting officer shall use every reasonable means available to protect the Government

Responsible Prospective Contractors

from the improper expenditure of Federal funds. Actions should include at least one of the following: preaward and postaward audits; direct identification of cost with deliverables; billing **by** contract phases or tasks; fidelity bonding **or** other guarantees **by** the parent company or principals of the organization; increased scrutiny of vouchers and financial reports; and frequent site visits to verify the incurrence of specific costs and the relationship **of** technical progress with the amount billed.

(B) If a prospective contractor's accounting or billing system (or both) is determined to be inadequate, corrective action **must be taken** before that **organization** is awarded a contract. When corrective action cannot be completed until after the award and the contracting officer determines that the award must **be** made, the contracting officer shall consult with **the cognizant cost advisor** and take the appropriate actions set forth in FAR 16.104 to ensure that the Government's interests will **be** protected and the contract will **be** adequately costed and administered. Awards made under the preceding condition must **be** approved in writing by the principal official responsible for acquisition.

Subpart 309.4

Debarment, Suspension, and Ineligibility

309.403 Definitions.

"Acquiring agency's head or a designee", as used in the FAR, shall mean, unless otherwise stated in this subpart, the head of the contracting activity. Acting in the capacity of the acquiring agency's head, the head of the contracting activity may make the required justifications or determinations, and take the necessary actions, specified in FAR §§ 9.405, 9.406, and 9.407 for his or her respective activity, but only after obtaining the approval of the debarring or suspending official, as the case may be.

"Debarring official" means the Assistant Secretary for Management and Budget, or his/her designee.

"Initiating official" means either the contracting officer, the head of the contracting activity, the Deputy Assistant Secretary for Management and Acquisition, or the Inspector General.

"Suspending official" means the Assistant Secretary for Management and Budget, or his/her designee.

309.404 Parties excluded from procurement programs.

(c) The Office of Management and Acquisition (OMAC) shall perform the actions required by FAR 9.404(c).

(4) OMAC shall maintain all documentation submitted by the initiating official recommending the debarment or suspension action and all correspondence and other pertinent documentation generated during the **OMAC** review.

309.405 Effect of listing.

(a) The head of the contracting activity **may**, with the concurrence of the debarring or suspending official, make the determinations referenced in FAR 9.405(a), regarding contracts for their respective activities.

(1) If a contracting officer considers it necessary to award **a** contract, or consent to a subcontract with a debarred or suspended contractor, the contracting officer shall prepare a determination, including all pertinent documentation, and submit it through acquisition channels to the head of the contracting activity. The documentation **must** include the date by which approval is required and **a** compelling reason for the proposed action. Some examples of circumstances that may constitute a compelling reason for the award to, or consent to a subcontract with, a debarred or suspended contractor include:

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(i) The property or services to be acquired are available only from the listed contractor;

(ii) The urgency of the requirement dictates that the Department deal with the listed contractor: or

(iii) There are other compelling reasons which require business dealings with the listed contractor.

(2) If the head of the contracting activity decides to approve the requested action, he/she shall request the concurrence of the debarring or suspending official and, if given, shall, in writing, inform the contracting officer of the decision within the required time period.

309.405-1 Continuation of current contracts.

(a) Notwithstanding the debarment or suspension of a contractor, contracting officers may continue contracts or subcontracts in existence at the time the contractor was debarred or suspended, unless the head of the contracting activity or debarring or suspending official directs otherwise. A decision as to the type of termination action, if any, to be taken should be made only after review by the awarding activity's contracting and technical personnel. The contracting officer shall coordinate any termination with the Office of the General Counsel to ensure the propriety of the proposed action.

(b) Contracting officers shall not review the current contracts of debarred or suspended contractors, or otherwise extend their duration, unless the head of the contracting activity determines to do so, with the concurrence of the debarring or suspending official. The contracting officer shall prepare a determination meeting the requirements of 309.405(a) and submit it, through acquisition channels, to the head of the contracting activity. If the head of the contracting activity agrees with the determination, he/she shall obtain the concurrence of the debarring or suspending official.

309.406 Debarment.

309.406-3 Procedures.

(a) Investigation and referral. Whenever an apparent cause for debarment becomes known to an initiating official, that person shall prepare a report incorporating the information required by 309.470-2, if known, and forward it through appropriate channels with a written recommendation, to the debarring official. Contracting officers shall forward their reports in accordance with 309.470-1. The debarring official shall initiate an investigation through such means as he/she deems appropriate.

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(b) **Decisionmaking process.** The debarring official shall review the results of the investigation, if any, and make a written determination whether or not debarment procedures are to be commenced. A copy of the determination shall be promptly sent through appropriate channels to the initiating official, and the contracting officer, if necessary. If the debarring official determines to commence debarment procedures, he/she shall, after consultation with the Office of the General Counsel, notify the contractor in accordance with FAR 9.406-3(c). If the proposed action is not based on a conviction or judgment and the contractor's submission in response to the notice raises a genuine dispute over facts material to the proposed debarment, the debarring official shall arrange for fact-finding hearings and take the necessary actions specified in FAR 9.406-3(b)(2). The debarring official shall also ensure that written findings of fact are prepared, and shall base the debarment decisions on the facts as found, after considering information and argument submitted by the contractor and any other information in the administrative record. The Office of the General Counsel shall represent the Department at any fact-finding hearing and may present witnesses for HHS and question any witnesses presented by the contractor.

309.407 Suspension.

309.407-3 Procedures.

(a) **Investigation and referral.** Whenever an apparent cause for suspension becomes known to an initiating official, that person shall prepare a report incorporating the information required by 309.470-2, if known, and forward it through appropriate channels, with a written recommendation, to the suspending official. Contracting officers shall forward their reports in accordance with 309.470-1. The suspending official shall initiate an investigation through such means as he/she deems appropriate.

(b) **Decisionmaking process.** The suspending official shall review the results of the investigation, if any, and make a written determination whether or not suspension should be imposed. A copy of this determination shall be promptly sent through appropriate channels to the initiating official and the contracting officer, if necessary. If the suspending official determines to impose suspension, he/she shall, after consultation with the Office of the General Counsel, notify the contractor in accordance with FAR 9.407-3(c). If the action is not based on an indictment and, subject to the provisions of FAR 9.407-3(b)(2), the contractor's submission in response to the notice raises a genuine dispute over facts material to the suspension, the suspending official shall, after suspension has been imposed, arrange for fact-finding hearings and take the necessary actions specified in FAR 9.407-3(b)(2).

Debarment, Suspension, and Ineligibility

309.470 Reporting of suspected causes for debarment or suspension, or the taking of evasive actions.

309.470-1 Situations where reports are **required**.

A report incorporating the information required by 309.470-2 shall be forwarded, in duplicate, **by** the contracting officer through acquisition channels to the **OMAC** when-

(a) A contractor **has** committed, or is suspected of having committed, any of the acts described in FAR **9.406-2** or FAR 9.407-2: or

(b) A contractor is suspected **of** attempting to **evade the** prohibitions of debarment or suspension imposed under this regulation, or any other comparable regulation, **by changes** of address, multiple addresses, formation of new companies, or by other **devices**.

309.470-2 Contents *of reports*.

Each report prepared under 309.470-1 shall be coordinated with the Office of the General Counsel and shall include the following information, where available:

(a) Name and address of contractor.

(b) Name of the principal officers, partners, owners, **or** managers.

(c) All known affiliates, subsidiaries, or parent firms, and the nature of the affiliation.

(d) Description of the contract or contracts concerned, including the contract number, and office identifying numbers or symbols, the amount of each contract, the amount **paid the** contractor and the amount still due, **and the** percentage of work completed and to **be** completed.

(e) The status of vouchers.

(f) Whether contract funds have been assigned pursuant to the Assignment of Claims **Act**, as amended, 31 U.S.C. 3727, 41 U.S.C. 15, and, if so assigned, **the name and address of the** assignee and **a copy of** the assignment.

(g) Whether any other contracts **are** outstanding with the contractor or **any** affiliates, and, if so, the amount of such **contracts, whether** these funds have been assigned pursuant to the Assignment of Claims

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Act, as amended, 31 U.S.C. 3727, 41 U.S.C. 15, and the amounts paid or due on such contracts.

- (h) A complete summary of all available pertinent evidence.
 - (i) A recommendation as to the continuation of current contracts.
 - (j) An estimate of damages, if any, sustained by the Government as a result of the action of the contractor, including an explanation of the method used in making the estimate.
 - (k) The comments and recommendations of the contracting officer and statements regarding whether the contractor should be suspended or debarred, whether any limitations should be applied to such action, and the period of any proposed debarment.
 - (l) As an enclosure, a copy of the contract(s) or pertinent excerpts therefrom, appropriate exhibits, testimony or statements of witnesses, copies of assignments, and other relevant documentation or a written summary of any information for which documentation is not available.
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Part 313
Small Purchase and Other
Simplified Purchase Procedures

Subpart 313.1 • General

Section

- 313.101 Definitions.
- 313.104 Procedures.
- 313.105 Small business • small purchase set-asides.
- 313.106** Competition and price reasonableness.
- 313.107** Solicitation and evaluation of quotations.

Subpart 313.2 • Blanket Purchase Agreements

- 313.201 General.
- 313.204 Purchases under Blanket Purchase Agreements.

Subpart 313.4 • **Imprest** Fund

- 313.403 Agency responsibilities.

Subpart 313.5 • Purchase Orders

- 313.505 Purchase order and related forms.
- 313.505-3** Standard Form 44, Purchase Order • Invoice • Voucher.

Subpart 313.1

General

313.101 Definitions.

"Small purchase procedures"

(a) - (c) Reserved.

(d) Acquisition of architect-engineer professional services of any dollar amount.

313.104 Procedures.

(a) - (h) Reserved.

(i) Small purchase methods are designed to acquire defined, off-the-shelf, standard supplies, equipment, or services which may be awarded on the basis of a fixed price quotation. Small purchase methods should not be used to acquire R & D, complex studies, services, and the like (which require judgmental technical evaluations and involve negotiations) where the award cannot be confidently made on the low price. Where requirements are not suitable for accomplishment using small purchase methods, **more** formal negotiation methods or sealed bidding should be used.

(j) Small purchases accomplished in accordance with this Part may not be awarded on a cost-reimbursement basis.

(k) Small purchase methods should be used with great prudence for the acquisition of consultants to avoid the increased possibility of using consultants in an improper personal services capacity.

313.105 Small business-small purchase set-asides.

(a) - (d)(1) Reserved.

(d)(2) The contracting officer shall consult with the small and disadvantaged business utilization specialist (**SADBUS**) to determine whether small business sources are known by the **SADBUS** before determining not to proceed with the small business-small purchase set-aside. Coordination with the **SADBUS** is not required for small purchases at or below ten percent of the small purchase limitation.

General

313.106 Competition and price reasonableness.

(a) Purchases not over 10 percent of the small Purchase limitation. Purchases not exceeding this limit are exempt from the documentary requirements of FAR Subpart 6.3 and Subpart 306.3. However, purchases shall not be made repetitively from one source except for reasons which clearly and convincingly justify other than full and open competition (see FAR Subpart 6.3).

(b) Purchases over 10 Percent of the small purchase limitation.

(1) - (4)(i)(C) Reserved.

(4)(i)(D) Women-owned small business.

(c) Data to support small purchases over 10 percent of the small Purchase limitation. (1) Reserved.

(2) Purchases ranging in excess of 10 percent of the small purchase limitation up to and including the small purchase limitation which are made without full and open competition require justification as to why competition was not obtained. The justification, which may be in the form of a paragraph or paragraphs in the request for contract or requisition, must address the considerations in FAR Subpart 6.3 and Subpart 306.3. The contracting officer may approve or disapprove the justification. Award of the contract or purchase order by the contracting officer shall constitute approval of the justification (see 306.304(a)(1)).

313.107 Solicitation and evaluation of quotations.

(a) - (d) Reserved.

(e) Amendments. (1) If after the issuance of a request for quotations but before the closing date of their receipt, it becomes necessary (i) to make significant changes in the quantity, specifications, or delivery schedule, (ii) to make any change in the closing date, or (iii) to correct a defect or ambiguity, the change shall be accomplished by issuance of an amendment to the request. Requests for quotations using the Standard Form 18 may be amended by letter. Oral requests for quotations may be amended orally.

General

(2) When it is considered necessary to issue an amendment to a **request** for quotations, the period of time remaining before closing and the **need for** extending this period by postponing the time set for closing must be considered. **Where** only a short **time remains** before the time set for closing, extension **of** time may be made by telegram-or telepho.-----This notification should be confirmed in the amendment.

(3) Any information given to one potential quoter concerning a **request for** quotations shall be furnished promptly to all other potential **quoters** in an amendment to the request, if the information is necessary to potential quoters in submitting quotations, or if the lack of the information would be prejudicial to uninformed potential quoters.

Subpart 313.2

Blanket Purchase Agreements

313.201 General.

(a) - (d) Reserved.

(e) Each blanket purchase arrangement (BPA) shall be documented by issuance of a contractual instrument which is appropriately numbered.

313.204 Purchases under Blanket Purchase Agreements.

(a) - (d) Reserved.

(e)(5) Delivery documents, invoices, etc. signed by the Government employee receiving the item or service will be forwarded to the fiscal office or other paying office as designated by the **OPDIV.** Payment will be made on the basis of the signed document, invoice, etc. Contracting offices will ensure that established procedures allowing for availability of funds are in effect prior to placement of orders.

Subpart 313.4

Imprest Fund

313.403 Agency responsibilities.

(a) The amount of each imprest fund shall be established on the basis of the estimated monthly payment and the need for replenishment. A review shall be made by the **responsible official** at least quarterly to ensure that the fund is not in excess of needs, and appropriate adjustments are made accordingly.

(b) Resealed.

(c) Requests to establish imprest funds shall be made to the responsible fiscal office. At larger **activities** where the **cashier** may not be conveniently located near the **purchasing** office, a Class C Cashier may be installed in the **purchasing** office. Documentation of cash purchases shall be in accordance with instructions contained in the HHS Voucher Audit Manual Part 1, Chapter I-10.

Subpart 313.5

Purchase orders

313.505 Purchase order and related forms.

313.505-3 Standard Form 44, Purchase Order - Invoice - Voucher.

(d) Since the Standard Form 44 is an accountable form, a record shall be maintained of serial numbers of the form, to whom issued, and date issued. **SF-44's** shall be kept under adequate lock and key to prevent unauthorized use. A reservation of funds shall be established to cover total anticipated expenditures prior to use of the SF-44.

Part 314

Sealed Bidding

Subpart 314.2 • Solicitation of Bids

Section

314.202-7 Facsimile bids.
314.213 Annual submission of representations and
certifications.

Subpart 314.4 • Opening of Bids and Award of Contract

314.404 Rejection of bids.
314.404-1 Cancellation of invitations after opening.
314.406 Mistakes in bids.
314.406-3 Other mistakes disclosed before award.
314.406-4 Mistakes after award.
314.407 Award.
314.407-8 Protests against award.

Subpart 314.2

Solicitation of Bids

314.202-7 Facsimile bids.

The principal official responsible for acquisition (PORA) shall determine whether to allow the use of facsimile bids. If the PORA decides to allow the use of facsimile bids, internal procedures shall be developed, in accordance with the FAR, to ensure uniform processing and control.

314.213 Annual submission of representations and certifications.

Each principal official responsible for acquisition (PORA) shall determine whether to allow the use of the annual submission of representations and certifications by bidders. If allowed, the provisions of FAR 14.213 shall be followed.

Subpart 314.4

Opening of Bids and
Award of Contract

314.404 **Rejection of** bids.

314.404-1 Cancellation of invitations after opening.

(a) and (b) **Reserved.**

(c) The chief of the contracting **office** (CCO) shall make the determination required by FAR 14.404-1(c).

(d) **Reserved.**

(e) The **CCO** shall make the referenced determination.

314.406 Mistakes in bids.

314.406-3 Other mistakes disclosed before award.

(a) - (d) **Reserved.**

(e) Authority has been delegated to the Departmental **Protest** Control Officer, Division of Acquisition Policy, Office of Acquisition and Grants Management (OAGM) to **make** administrative **determinations in connection with mistakes in bid** alleged after opening and before award. This authority may not be redelegated.

(f) Each proposed determination shall have **the concurrence** of the Chief, Business Law Branch, Business and Administrative Law Division, Office of General Counsel.

(g) (1) and (2) **Reserved.**

(3) The data required by FAR **14.406-3(g)(3)** shall be marked "IMMEDIATE ACTION - MISTAKE IN **BID**" and submitted through acquisition channels to the Departmental Protest Control Officer, Division of Acquisition Policy, Office of Acquisition and Grants Management (OAGM). The file shall be assembled in an orderly manner and shall include an index of enclosures. A single copy of the file is sufficient.

(4) Since examination of evidence is necessary to determine the proper **course of action** to be taken, no action will be taken on cases referred by telephone or telegraph.

Opening of Bids and
Award of Contract

(5) Where the evidence submitted by the bidder is incomplete or in need of clarification, the contracting officer shall document the file to indicate the effort made to obtain clear and convincing evidence to support the alleged mistake. Since the burden of providing such evidence lies with the **bidder-claimant**, repeated efforts to obtain such information are neither necessary nor desirable.

(h) Reserved.

(i) Doubtful cases shall not be submitted by the contracting officer directly to the Comptroller General, but shall be submitted as indicated in **314.406-3(g)(3)**.

314.406-4 Mistakes after award.

(a) and (b) Reserved.

(c) Authority has been delegated to the Departmental **Protest** Control Officer, Division of Acquisition Policy, OAGM to make administrative determinations in connection with mistakes in bid alleged after award. This authority may not be redelegated.

(d) Each proposed determination shall have the concurrence of the Chief, Business Law Branch, Business and Administrative Law Division, Office of General Counsel.

(e)(1) Reserved.

(2) The data required by FAR 14.406-4(e)(2) shall be marked "IMMEDIATE ACTION - MISTAKE IN **BID**" and submitted as prescribed in **314.406-3(g)(3)**.

314.407 Award.

314.407-8 Protests against award.

See Subpart 333.1 - Protests.

Part 315

. Contracting by Negotiation

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315.103

Converting from sealed bidding to negotiation procedures.

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Contracting by Negotiation

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- 315.804 Cost or pricing data.
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- 315.900 Scope of subpart.
- 315.905-70 Structured approach.
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Subpart 315.10 - Preaward, Award, and Postaward
Notifications, Protests, and Mistakes

- 315.1000 General.
- 315.1003 Debriefing of unsuccessful offerors.
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Subpart 315.70 - Requests for Contract

- 315.7000 Scope of subpart.
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Contracting by Negotiation

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315.7006	Review.

Subpart 315.1

General Requirements for Negotiation

315.103 Converting from sealed bidding to negotiated procedures.

The chief of the contracting office has the authority to make the determination referenced in FAR 15.103.

Subpart 315.2

Negotiation Authorities

315.201 National emergency.

(a) and (b) Reserved.

(c) Limitations. The applicable authority may be used by the contracting officer only for **assistance** to **labor** surplus **areas** or small business concerns. The applicable authority shall not be used for administration **of** the Balance **of** Payments program, or other programs, without the prior written approval **of** the principal official responsible for acquisition (not delegable).

315.202 Public exigency.

(a) and (b) Reserved.

(c) Limitations. The contracting officer shall provide a copy of the D & F to the principal official responsible for acquisition.

315.205 Services of educational institutions.

(a) and (b) Reserved.

(c) Limitations.

(1) The applicable authority shall be used only for the acquisition of specialized noncommercial services which are customarily performed by educational institutions. use of this authority for any service other than those listed in FAR 15.205 (b) shall require a written determination with supporting facts by the contracting officer that the particular type of service is available only from educational institutions.

(2) Proposals shall be solicited from as many educational institutions as **are** known to possess the required capability. Solicitation **of** a single educational institution shall require a written "Justification for Noncompetitive Acquisition" in accordance with the requirements of Subpart 315.71.

(3) Where the circumstances of both (1) and (2) above pertain in the same case, the required determination shall be combined and made by the official designated in 315.7106.

Negotiation Authorities

315.210 Impractical to secure competition by formal advertising.

(a) Reserved.

(b) Application. Negotiation under the applicable authority shall be conducted on a competitive basis to the maximum practicable extent, except when negotiation is justified under the circumstances specified in FAR 15.210 (b)(1) or **(16)**.

(1) The illustration specified in FAR **15.210(b)(3)** shall apply only if the negotiation is for the identical requirements specified in the unresponsive bid. If specification deviations are authorized, or if delivery, quantity, or other requirements are changed, the revised requirements shall be readvertised or, if appropriate, negotiated under one of the other authorities prescribed in FAR Subpart 15.2.

(2) Cases of doubt in applying the illustration specified in FAR **15.210(b)(13)** shall be resolved in favor of formal advertising.

315.211 Experimental, developmental, or research work.

(a) and **(b)** Reserved.

(c) Limitations. Whenever more than single unit quantities of equipment or supplies are to be acquired under this authority, the quantity shall be justified as reasonable and essential by the program authority submitting the acquisition request (see FAR **15.211(c)(2)(iii)**).

315.212 Purchases not to be publicly disclosed.

(a) and (b) Reserved.

(c) Limitations. The applicable authority shall be used in preference to any other authority when competition is to be limited because of the need for nondisclosure (also see FAR **5.202(a)**).

315.215 Otherwise authorized by law.

(a) Reserved.

Negotiation Authorities

(b) Application. When other statutory authority is the basis for negotiation, the proper citation for the contract is 41 U.S.C. **252(c)(15)** plus the section number, title of the Act, and the Public Law number (**or** U.S. Code citation) of the **statute** which permits negotiation.

subpart 315.3

**Determinations and Findings
to Justify Negotiation**

315.303 Class D & F's.

(a) Class D & F's shall be justified on the basis of need to avoid processing multiple determinations and findings when more than one contract must be negotiated under the same negotiation authority for the same program or project. The multiple acquisitions **must** be for items or services which are to be negotiated at or near the same time and are so related as to constitute a logical and distinct class.

(b) Reserved.

(c) All class D & F's shall be limited to a period of one (1) year or less, except that those determinations and findings required by FAR 15.211 may be authorized for three (3) years.

315.304 Content.

See 315.370 for guidance and formats regarding specific D & F's.

315.307 Signatory authority.

The following is a summarization of the officials authorized to sign D & F's as indicated in Table 15-1 of the FAR. It also designates officials authorized to sign D & F's for the agency head, as permitted.

(a) Contracting officer. Individual D & F's addressed in FAR 15.202, 15.207, 15.208, and 15.210 shall be signed by the contracting officer.

(b) Principal official responsible for acquisition (PORA). The PORA shall sign **all** class D & F's made under the negotiation authorities addressed in FAR 15.202, 15.207, 15.208, and 15.210. The PORA is authorized to sign individual D & F's addressed in FAR 15.211 when neither the contract nor any single modification will be over \$25,000 (see FAR Table 15.1). The PORA is also authorized to sign both individual and class D & F's addressed in FAR 15.214.

Determinations and Findings
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(c) Agency head. The agency head shall sign individual D & F's made under the negotiation authority addressed in FAR 15.211 when more than \$25,000 will be obligated, and all class D 6 F's made under the same authority. The agency head shall sign both individual and class D & F's made under the negotiation authorities addressed in FAR 15.212 and 15.213.

315.370 **Sample** D and F formats.

Principal officials responsible for acquisition shall prescribe **formats** for determinations and findings made under FAR 15.202, 15.207, and 15.208. The following formats shall be used for determinations and findings made under FAR 15.210 through 15.214.

(a) FAR 15.210 (Individual contract).

DEPARTMENT OF HEALTH AND HUMAN SERVICES
DETERMINATION AND FINDINGS

Authority to Negotiate an Individual
Contract Under 41 U.S.C. 252(c)(10)

I hereby find that:

(1) The (agency title) proposes to acquire (**describe** the work, service, or product and identify the program or project).

(2) It is impracticable to secure competition by formal advertising for the contract contemplated because:

(Set forth facts and circumstances which support a judgment that competition by formal advertising is impracticable. Facts and circumstances presented must conform to the FAR 15.210 subparagraph selected as justification for negotiation.)

I hereby determine that:

On the basis of the above findings, the proposed acquisition is for (work, services, or products*)

*Use applicable word, words, or statement.

Determinations and Findings
to Justify Negotiation

for which it is impracticable to secure competition by formal advertising and that negotiation of a contract for **such** (work, Services, or products*) is authorized pursuant to 41 U.S.C. **252(c)(10)**, as contemplated by FAR 15.210(b)**, provided, the required (work service, or product*) has been authorized by law.

Date _____

(Signature)

(b) FAR 15.211 (Individual contract).

DEPARTMENT OF HEALTH AND HUMAN SERVICES
DETERMINATION AND FINDINGS

Authority to Negotiate an Individual
Contract Under 41 U.S.C. **252(c)(11)**

I hereby find that:

(1) The (agency title) proposes to acquire (describe work to be performed or product to be delivered, identify the program or project, and state the estimated contract price).

(2) The proposed acquisition is for (experimental, developmental, or research work, or for the manufacture or furnishing of property for experimentation, development, research, or test*). (Set forth facts and circumstances which support a judgment that the work to be performed is in fact experimental, developmental, or research.)

(3) It **is** impracticable to secure competition by formal advertising **for** the contract contemplated **because:**

(Set forth reasons why the acquisition contemplated cannot be formally advertised; e.g., only ultimate

Use applicable word, words, or statement.

*Insert appropriate FAR 15.210(b) subparagraph number.

Determinations and Findings
to Justify Negotiation

objectives and general scope of work can be outlined, work cannot be described by definite drawings and specifications, etc.)

I hereby determine that:

On the basis of the above findings, the proposed acquisition is for (experimental, developmental, or research **work, or** for the manufacture or furnishing of property for experimentation, development, research, or test*) and that negotiation of a contract for such (work or property*) is authorized pursuant to 41 U.S.C. **252(c)(11)**; provided, the (work or property*) has been authorized by law.

Date - - _____
(Signature)

(c) FAR 15.211 (Class of contracts).

DEPARTMENT OF HEALTH AND HUMAN SERVICES
DETERMINATION AND FINDINGS

Authority to Negotiate a Class of
Contracts under 41 U.S.C. **252(c)(11)**

I hereby find that:

(1) The (agency title) proposes to negotiate approximately (number) contracts in support of (identify the program or project, and state the anticipated funding level).

(2) The proposed acquisitions are **for** (experimental, developmental, or research **work, or** for the manufacture or furnishing of property for experimentation, development, research, or **test***).

(Set forth facts and circumstances which support a judgment that the work to be performed is in fact experimental, developmental **or** research).

*Use applicable word, words, or statement.

Determinations and Findings
to Justify Negotiation

(3) It is impracticable **to** secure competition by formal advertising for the contracts contemplated because:

(Set forth reasons why the acquisitions contemplated cannot be formally advertised; e.g., only ultimate objectives and general scope of work can be outlined, work cannot be described by definite drawings and specifications, etc.)

I hereby determine that:

On the basis of the above findings, the proposed acquisitions **are** for (experimental, developmental, or research work, or for the manufacture or furnishing of property **for** experimentation, development, research, or test*) and that negotiation of contracts for such **(work or property*)** is authorized pursuant to 41 U.S.C. **252(c)(11)**; provided the required **(work or property*)** has been authorized by law.

This class determination shall remain in effect until (state terminal date (limit effective period not to exceed three (3) years)).

Date _____ (Signature) _____

(d) FAR 15.212 (Individual contract).

DEPARTMENT OF HEALTH AND HUMAN SERVICES
DETERMINATION AND **FINDINGS**

Authority to Negotiate an Individual
Contract Under 41 U.S.C. **252(c)(12)**

I hereby find that:

(1) The (agency title) proposes to acquire (describe the work, service, **or** product and identify the program or project).

***Use** applicable word, words, or statement.

Determinations and Findings
to Justify Negotiation

(2) This acquisition cannot be publicly disclosed because (explain either the basis **for** classification of the contract or the other considerations which the agency head should know in order **to** determine that the property **or** services should not be publicly disclosed).

(3) (Set forth reasons why the acquisition cannot be formally advertised).

I hereby determine that:

On the basis **of** the **above** findings, acquisition of the (property or services*) should not be publicly disclosed and the negotiation of a contract for such (property **or** services*) is authorized pursuant to 41 U.S.C. **252(c)(12)**; provided, the required (property or service*) **has** been authorized **by law**.

Date _____
_____ (Signature)

(e) FAR 15.213 (Individual contract).

The following is an example of a **D** and **F** illustrative of the type and amount of information which **may** be considered sufficient **to justify** negotiation under FAR 15.213. Contracting activities are **to develop the necessary D & F** based upon the sample.

DEPARTMENT **OF** THE INTERIOR
FINDINGS MD DETERMINATION UNDER SECTION
302(c)(13) OF THE FEDERAL PROPERTY AND
ADMINISTRATIVE SERVICES ACT OF 1949

Findings

In accordance with the requirements **of** sections **302(c)(13)** and 307 of the Federal Property and Administrative Services Act of **1949**, 63 Stat. 377, as amended, I make the following findings:

*Use applicable word, words, or statement.

Determinations and Findings
to Justify Negotiation

(1) The Alaska Road Commission has stated that it has a requirement for 25 - - - - - (Make and

trucks as set forth in (letter) or
(type)
(requisition) dated - - - - -, and has
submitted, by letter dated - - - - ; signed
by - (Name and title) -, information in justifi-
cation for such purchase under section 302(c)
(13), as described or included in the findings
set forth below.

(2) The trucks in question are required for use
at - (District or Area) -, Alaska. This location
is accessible only by - (Indicate: i.e. "boat"

or "boat and air" etc.) and for several months
each year is accessible only by
The Government's operations which consist of -
(General description only), require the use of
trucks of this type. The location presently has
of these trucks with stocks of spare
parts determined necessary from experience to
maintain these trucks in proper operational
efficiency. There are also trucks of
other manufacture with required stocks of spare
parts which will gradually be eliminated by
standardization. No commercial supply or service
centers are maintained at this remote location
or within approximately w - e - - miles thereof.

(3) It is impractical to provide service and
repair facilities for numerous makes of vehicles
and to maintain stocks of parts necessary to keep
the various makes in operating condition. Each
make of vehicle usually requires additional
special equipment for proper servicing and
repair. This results in added cost, housing,
and related administrative expense. Similarly
each additional make requires the maintenance of

Determinations and Findings
to Justify Negotiation

separate stocks of spare service and repair parts which require additional bins, storage, and clerical and administrative expenses. The annual savings in cost estimated to result from the maintenance of reduced stocks of parts made possible by standardizing on these trucks is

- - - - -

(4) (State other factors and details as applicable.)

(5) Under these circumstances the Alaska Road Commission regards the standardization and interchangeability as necessary in the public interest.

Determination

(1) Based upon the foregoing findings, I hereby determine, within the meaning of section 302(c) (13) of the Federal Property and Administrative Services Act of 1949, that:

(A) The equipment described is technical equipment;

(B) Negotiation is necessary, in the situation and in the locality described, in order to assure standardization of the equipment and interchangeability of parts; and

(C) Such standardization and interchangeability is necessary in the public interest.

(2) Upon the basis of these findings and determinations, I hereby authorize the negotiation of a contract (or contracts) for acquisition of the equipment described in these findings pursuant to section 302(c)(13) of the Federal Property and Administrative Services Act of 1949.

- - Secretary of the Interior. - -

Determinations and Findings
to Justify Negotiation

(f) FAR 15.214 (Individual contact).

DEPARTMENT OF HEALTH AND HUMAN SERVICES
DETERMINATION AND FINDINGS

Authority to Negotiate an Individual
Contract Under 41 U.S.C. 252(c)(14)

I hereby find that:

(1) The (agency title) proposes to acquire (described work, service **or** product and identify the program or project).

(2) The proposed **acquisition** was solicited by formal advertising **under** IFB (No. and date). The lowest responsive bid offered a (unit **or aggregate***) price of \$_____ which is considered excessive in relation to the prices (**\$** _____) estimated **as** reasonable by the (agency title). (Note: If applicable, use the following statement: **"The prices of bids received were not independently arrived at in open competition."** Set forth facts and circumstances to support this statement.)

I hereby determine that:

On the basis of the above findings, **bid prices received under** IFB (No. and date) **(are** unreasonable: have not been independently arrived at in open competition*) and that negotiation of **a** contract for (describe work, service or product) is authorized pursuant to 41 U.S.C. **252(c)(14)**; provided, the required (property or service*) has been authorized by law and the limitations under FAR 15.214 are complied with.

Date _____

(Signature)

*Use applicable word, words, or statement.

Subpart 315.4

Solicitation and Receipt of Proposals and Quotations

315.402 General.

(i) The principal official responsible for acquisition (PORA) shall determine whether to allow the use of facsimile proposals. If the PORA decides to allow the use of facsimile proposals, internal procedures shall be developed, in accordance with the FAR, to ensure uniform processing and control.

315.404 Presolicitation notices and conferences.

(c) Presolicitation conferences. (1) The presolicitation conference may only be used when approved by the chief of the contracting office.

315.405 Solicitations for information and planning purposes.

315.405-1 General.

The determination approval required by FAR 15.405-1 that a solicitation for information or planning purposes is appropriate shall be made by the chief of the contracting office.

315.406 Preparing requests for proposals (RFP's) and requests for quotations.

(a) The contracting officer is responsible for preparing the RFP with the assistance of the project officer. The purpose of the RFP is to convey information that prospective offerors need to prepare a proposal. The RFP includes the statement of work, and the terms, conditions, and provisions that will form the basis for the final definitive contract. It specifies all the information that prospective offerors must furnish to permit a meaningful and equitable evaluation of their offers. The RFP must be clear, complete, accurate, and consistent with the requirements of the acquisition so that it provides all who receive it with the same understanding of the requirements. Much of the information in the RFP is either derived directly from the request for contract or is otherwise furnished by the project officer. Therefore, it is important that the project officer develop a meaningful request for contract and supporting documentation during the initial presolicitation phase which will fully satisfy program needs and objectives when included in the RFP (see Subpart 315.70).

Solicitation and Receipt of Proposals and Quotations

(b) Careful drafting of the RFP is vital to the proper working of the competitive process. The success of the acquisition depends, in large measure, on how well the work to be performed and the basic ground rules under which the competition will be conducted are described in the RFP. Particular effort must be made to develop a comprehensive and accurate statement of work (see 307.105-3 and FAR 35.007) to prevent ambiguities and to avoid misunderstandings which might otherwise surface at later stages of the acquisition.

(c) Care should be taken to avoid conflicting statements in the RFP. Clear distinctions must be made as to the contents and purpose of the statement of work, the instructions to offerors, and the evaluation criteria. Briefly:

(1) The statement of work must clearly specify the work to be done by the resultant contractor (or, if it is an R & D acquisition, present a clear statement of the requirements: see FAR Part 35);

(2) The general, technical, and business instructions must delineate all the essential information prospective offerors need to know in preparing their proposals (see 315.406-5(b)); and

(3) The evaluation criteria must clearly indicate the technical, management, personnel, and cost or pricing factors which are to be the major considerations in selecting the successful offeror (see 315.406-5(c)).

(d) The RFP must require that proposals be submitted in two parts - a "Technical Proposal" and a "Business Proposal." Each part is to be separate and complete in itself so that evaluation of one may be accomplished independently of the other.

(e) The technical and business proposal instructions of the RFP must provide all the information deemed essential for proper evaluation of the proposals so that all prospective offerors are aware of all requirements, and so that differences in proposals will reflect each offeror's individual approach to the clear and unambiguous requirements and criteria stated in the RFP.

(f) The RFP must inform prospective offerors of all evaluation criteria and of the relative importance or weight

Solicitation and Receipt of
Proposals and Quotations

attached to each criterion. Evaluation criteria must be described sufficiently enough in the RFP to inform prospective offerors of the significant matters which should be addressed in the proposals. Only the evaluation criteria set forth in the RFP shall be used in the evaluation of proposals, and the criteria can only be modified by a formal amendment to the RFP.

(g) Generally, the **RFP** will provide that the technical proposal not contain any reference to cost. However, resource information such as data concerning labor hours and categories, materials, subcontracts, travel, computer time, etc., must be included in the technical proposal so that the offeror's understanding of the scope of work may be evaluated.

(h) The project officer should be offered the opportunity to review the finalized RFP before it is printed and released.

315.406-1 Uniform contract format.

The uniform contract format specified in **FAR 15.406-1** and Table 15-1 shall be used by all contracting activities of the Department.

315.406-2 Part I - The Schedule.

(a) Section A. Solicitation/contract form.

(1) and (2) Reserved.

(3) Contracting activities are encouraged to use SF 33 for **RFPs**. In those instances where a contracting activity believes the SF 33 is not appropriate, a transmittal letter may be used. However, it is essential that the transmittal letter contain the pertinent information that must be brought to the attention of prospective offerors, so the information contained in **FAR 15.406-2(a)(3)** shall be included in it. The transmittal letter should also contain reference to the solicitation provision "Late Submissions, Modifications, and Withdrawals of Proposals or Quotations" and stress the importance of timeliness. The last paragraph of the transmittal letter should provide the name and complete telephone number of a contract specialist who can provide information concerning the solicitation,

Solicitation and Receipt of
Proposals and Quotations

315.406-3 Part II - Contract clauses.

(a) Section I, Contract clauses. This section should contain all the pertinent contract clauses applicable to the acquisition, to include those contained in the general clauses, any additions or modifications to the general clauses, and special contract clauses (see Part 352 - Solicitation Provisions and Contract Clauses).

3X.406-5 Part IV - Representations and instructions.

(a) ~~Section K. Representation, certifications, and other statements of offerors or quoters.~~

(1) This section shall begin with the following statements and continue with the applicable representations and certifications:

To Be Completed by the Offeror: (The Representations and Certifications must be executed by an individual authorized to bind the offeror.) The offeror makes the following Representations and Certifications as part of its proposal (check or complete all appropriate boxes or blanks on the following pages).

(Name of Offeror)

(RFP No.)

(Signature of Authorized Individual)

(Date)

(Typed Name of Authorized Individual).

Note: The penalty for making false statements in offers is prescribed in 18 U.S.C. 1001.

Solicitation and Receipt of
Proposals and Quotations

(2) The contracting officer shall insert in all solicitations the representations and certifications at -

- (i) **FAR 52.203-2**, Certificate of Independent Price Determination;
- (ii) **FAR 52.203-4**, Contingent Fee Representation and Agreement;
- (iii) **FAR 52.204-3**, Taxpayer Identification:
- (iv) **FAR 52.209-5**, Certification Regarding Debarment, Suspension, Proposed Debarment, and Other Responsibility Matters;
- (v) **FAR 52.215-6**, Type of Business Organization;
- (vi) **FAR 52.215-20**, Place of Performance:
- (vii) **FAR 52.219-1**, Small Business Concern Representation:
- (viii) **FAR 52.219-2**, Small Disadvantaged Business Concern Representation;
- (ix) **FAR 52.219-3**, Women-Owned **Small** Business Representation:
- (x) **FAR 52.222-19**, Walsh-Healey Public Contracts Act Representation;
- (xi) **FAR 52.222-21**, Certification of Nonsegregated Facilities:
- (xii) **FAR 52.222-22**, Previous Contracts and Compliance Reports:
- (xiii) **FAR 52.222-25**, Affirmative Action Compliance;
- (xiv) **FAR 52.223-1**, Clean Air and Water Certification;
- (xv) **FAR 52.223-5**, Certification Regarding a Drug-Free Workplace:
- (xvi) **FAR 52.225-1**, Buy American Certification;
- (xvii) **FAR 52.225-12**, Notice of Restrictions on Contracting **With** Sanctioned Persons:
- (xviii) **FAR 52.230-2**, Cost Accounting Standards Notices and Certification (Nondefense); and

Solicitation and Receipt of
Proposals and Quotations

(xix) FAR 15.804-4, Certificate of Current Cost or Pricing Data.

The following paragraph shall be inserted between the title and text of this certificate:

(When a certificate of cost or pricing data is required to be submitted in accordance with Federal Acquisition Regulation (FAR) 15.804-4, the Contracting Officer will request that the offeror complete, execute, and submit to the Contracting Officer a certification in the format shown in the following Certificate of Current Cost or Pricing Data. The certification shall be submitted only at the time negotiations are concluded. Offerors should complete the certificate set forth below and return it when requested by the Contracting Officer.)

(b) Section L, Instructions, conditions, and notices to offerors and quoters.

This section shall be comprised of the general instructions, technical proposal instructions, and business proposal instructions, as well as pertinent solicitation provisions (see FAR 15.407).

(1) General instructions.

(i) The general instructions provide basic guidance to prospective offerors that informs them of what is required in the preparation and submission of proposals. The general instructions must include the following statements and any instructions pertinent to the individual acquisition and applicable requirements of the OPDIV, agency, or regional office.

GENERAL INSTRUCTIONS

The following instructions establish the acceptable minimum requirements for the format and content of proposals:

Your special attention is directed to the requirements for technical and business proposals to be

**Solicitation and Receipt of
Proposals and Quotations**

submitted in accordance with these instructions.

Any resultant contract shall include the general provisions applicable to the selected offeror's organization and type of contract awarded. Copies of general provisions may be obtained by contacting the contracting officer. Any additional clauses required by public law, executive order, or acquisition regulations, in effect at the time of execution of the proposed contract, will be included.

The proposal must be prepared in two parts: a "Technical Proposal" and a "Business Proposal." Each of the parts shall be separate and complete in itself so that evaluation of one may be accomplished independently of evaluation of the other. The technical proposal must not contain reference to cost; however, resource information, such as data concerning labor hours and categories, materials, subcontracts, etc., must be contained in the technical proposal so that your understanding of the scope of the work may be evaluated. It must disclose your technical approach in sufficient detail to provide a clear and concise presentation that includes, but is not limited to, the requirements of the technical proposal instructions.

The proposal must be signed by an official authorized to bind your organization. (Number) copies of your technical proposal and (number) copies of your business proposal must be submitted to: (Insert complete address indicating where the proposal is to be sent and how it is to be marked. Provide similar information for hand-delivered proposals.)

You may, at your discretion, submit alternate proposals, or proposals which deviate from the requirements; provided, that you also submit a proposal for performance of the work as specified in the statement of work. These proposals may be considered if overall performance would be improved or not compromised, and if they are in the best interest of the Government. Alternate proposals, or deviations from any requirements of this RFP, must be clearly

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identified.

The Government will evaluate proposals in accordance with the evaluation criteria set forth **in** Section **M** of this request for proposals.

It is understood that your proposal will become part of the official contract file.

The RPP does not commit the Government to pay any cost for the preparation and submission of a proposal. In addition, the Contracting Officer is the only individual who can legally commit the Government to the expenditure of public funds in connection with this proposed acquisition.

(ii) Include either of the following in the General Instructions if prospective offerors are to be informed of the Government's estimate of the level **of** effort necessary to accomplish the requirement:

The Government considers the level of effort to perform the resultant contract should take the following staff-hours: (insert a breakdown of the Government's staff-hour estimates by categories). These estimates are furnished for the offeror's information only and are not to be considered restrictive **for** proposal purposes.

OR

To assist you in the preparation of your proposal, the Government considers the effort to perform this contract to be approximately (insert the total number) staff-hours. This number is furnished for the offeror's information only and is not considered restrictive for proposal purposes.

(NOTE: The first paragraph should only be used for term (e.g. level of effort **task** order), rather than completion type, contracts.)

(iii) If the proposed contract will involve performance or services on a Government installation, insert the following in

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the General Instructions:

Offerors are urged and expected to inspect the site where services are to be performed and to satisfy themselves as to all general and local conditions that may affect the cost of performance of the contract, to the extent such information is reasonably obtainable. In no event will failure to inspect the site constitute grounds for claims by the contractor after the award of a contract.

(iv) If reference material is to be provided for use in preparation of proposals, insert either of the following:

To assist offerors in preparing their proposals, reference material consisting of (insert title or description of publications, specifications, drawings, reports, or other documentation being made available as reference material) will be available for inspection at (insert name and address of building and room number) .

offerors are expected to examine all reference material prior to preparation and submission of their proposals. Failure to do so will be at the offeror's risk.

OR

To assist offerors in preparing their proposals, reference material consisting of (insert title or description of publications, specifications, drawings, reports or other documentation being furnished as reference material) is enclosed. Offerors are expected to examine all reference material prior to preparation and submission of their proposal. Failure to do so will be at the offeror's risk.

(v) If the reference material being provided is to be returned to the Government, include the following statement:

All reference material furnished hereunder shall be returned within (insert number) days after the submission of proposals to (insert name and address

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of building and room number).

(vi) If an incentive type contract is being considered, a notice to the offeror of the Government's desire as to use of incentives considered applicable, objectives of the incentive performance goals, schedules, milestones, critical delivery parameters, and similar information must be included.

(2) Technical proposal instructions.

(i) The technical proposal instructions should clearly and concisely describe the information prospective offerors must provide in their technical proposals. The instructions should address the need for submission of a detailed work plan indicating how each aspect of the statement of work is to be accomplished, a discussion of how the work is to be organized, staffed, and managed, and statements of the qualifications and experience of the prospective offeror and its key personnel.

(ii) The technical proposal instructions must be specific enough to convey the information the program office will require from offerors to allow the technical proposal evaluators to determine whether a proposal is acceptable. Therefore, it is essential that the instructions are written to elicit the information necessary to fully address all the elements of the work plan with particular emphasis on the evaluation criteria, so that evaluators may readily evaluate each offer in the pertinent areas. The instructions should not require the submission of excessive information since this will complicate the evaluation process and could cause unnecessary proposal preparation costs for offerors.

(iii) The technical proposal instructions should require that technical proposals be prepared in a specified format to facilitate evaluation. A uniform format will minimize evaluators' efforts and should minimize the amount of extraneous and voluminous material sometimes included in proposals.

(iv) Since specific instructions must be developed to suit the needs of the individual acquisition, detailed guidance concerning the contents of the technical proposal instructions is not presented here. However, the following represents a sampling of general statements which may be helpful in the preparation of the instructions:

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TECHNICAL PROPOSAL INSTRUCTIONS

Proposals which merely offer to conduct a program in accordance with the requirements of the Government's scope of work will not be eligible for award. You must submit an explanation of the proposed technical approach in conjunction with the tasks to be performed in achieving the project objectives.

A detailed work plan must be submitted indicating how each aspect of the statement of work is to be accomplished. Your technical approach should be in as much detail as you consider necessary to fully explain your proposed technical approach or method. The technical proposal should reflect a clear understanding of the nature of the work being undertaken.

The technical proposal must include information on how the project is to be organized, staffed, and managed. Information should be provided which will demonstrate your understanding and management of important events or tasks. you must explain how the management and coordination of consultant and/or subcontractor efforts will be accomplished.

The technical proposal must include a list of names and proposed duties of the professional personnel, consultants, and key subcontractor employees assigned to the project. Their resumes should be included and should contain information on education, background, recent experience, and specific scientific or technical accomplishments. The approximate percentage of time each individual will be available for this project must be included. The proposed staff hours for each of the above individuals should be allocated against each task or subtask for the project.

The technical proposal must provide the general background, experience, and qualifications of the organization. Similar or related contracts, subcontracts, or grants should be included and contain the name of the customer, contract or grant number, dollar amount, time of performance, and the names

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and telephone numbers of the project officer and contracting/grants officer.

The technical proposal must contain a discussion of present or proposed facilities and equipment which will be used in the performance of the contract.

The technical proposal must be prepared and submitted in the following format:

(Provide the required format.)

(3) Business proposal instructions. Business proposal instructions consist of cost and pricing data and administrative and management data.

(i) Cost and pricing data. Prospective offerors must be informed in the business proposal instructions that they are required to submit cost or pricing information in sufficient detail to allow a complete cost analysis. (See FAR 15.804 for requirements on cost or pricing data.) Categories and amounts of labor, materials, travel, computer time, overhead, and other costs should be requested. Prospective offerors are to be provided Standard Form 1411, Contract Pricing Proposal Cover Sheet, for use in preparing the cost or pricing data, and are to be told to submit, as a minimum, cost proposals fully supported by cost and pricing data adequate to establish the reasonableness of the proposed amount. Prospective offerors are to comply with the instructions on the SF 1411 and fill in or check the appropriate boxes. In addition, they should be informed to itemize the cost for individual elements, such as analytical studies, reports, etc., and the estimated cost of each phase or segment of the offered performance.

(ii) Administrative and management data.

(A) The business proposal instructions must be written so that the contracting officer receives adequate information to evaluate each offeror's **management** capability and to determine whether each offeror is responsible. Therefore, under this section, information should be requested to allow the contracting officer to assess the following factors as they apply to the instant acquisition:

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- o The offeror's financial capability:
- o The offeror's capability to meet delivery or performance schedules;
- o The offeror's record of past performance:
- o The offeror's record of business integrity:
- o The offeror's possession of *necessary* organization, experience, and technical skills, or the ability to obtain them:
- o The offeror's possession of required facilities: and
- o Any **other** special consideration involved in the instant acquisition.

In some cases, these factors may duplicate evaluation criteria and may be adequately addressed in the technical proposal instructions. However, the contracting officer must ensure that they are covered in both the business proposal instructions and the technical proposal instructions.

(B) The contracting officer may determine that other administrative data in the **form of** additional business or cost information is **necessary**. Some examples of additional information include:

- o **A copy** of the current agreement on indirect **cost rates** ;
- o A copy of the most recent financial statements:
- o A discussion on the extent of proposed subcontracting with small and disadvantaged business enterprises;
- o A request for pricing or cost breakdown tailored to the instant **acquisition** to provide information for a more thorough and complete cost analysis: and
- o A request for explicit instructions on pricing of options and individual line items.

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However, care should be taken to request additional information only when necessary, to prevent excessive proposal preparation costs for offerors.

(c) The following are required statements which must be included in the RFP.

Your proposal must stipulate that it is predicated upon all the terms and conditions of this RFP. In addition, it must contain a statement to the effect that it is firm for a period of at least (insert number) days from the date of receipt by the Government.

It is HHS policy that contractors provide all equipment and facilities necessary for performance of **contracts**; however, in some instances, an exception may be granted to furnish Government-owned property or to authorize purchase with contract funds. If additional equipment must be acquired, you must include in your proposal the description and estimated cost of each item, and whether you propose to furnish the item with your own funds.

You must identify all Government-owned property in your possession and all property acquired from Federal funds, to which you have title, that is proposed to be used in the performance of the prospective contract.

The management and control of Government property must be in accordance with HHS Publication (OS) 686, entitled "Contractor's Guide for Control of Government Property (1990)," a copy of which will be provided upon request.

(c) Section M, Evaluation factors for award.

(1) General. (i) The evaluation criteria must be developed by the project officer and submitted to the contracting officer in the request for contract (RFC) for inclusion in the RFP.

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Development of these criteria and the assignment of the relative importance or weight to **each** criterion require the exercise of judgment on a case-by-case basis because they must be tailored to the requirements of the individual acquisition. Since the criteria will serve as **a standard against** which all proposals will be **evaluated**, it is imperative that they be chosen carefully to **emphasize** those factors considered to be critical in the selection of a contractor.

(ii) The finalized evaluation criteria and indications of their relative importance or weights, as included in the RFP, cannot be changed except by a formal amendment to the RFP issued **by the contracting** officer. No factors other than those set forth in the RFP shall be used in the evaluation of proposals.

(2) Review of evaluation criteria.

(i) The evaluation criteria should be reviewed by the **contracting** officer in terms of the work statement. This review **AS not intended to dictate** to the program **office** or project officer, but rather to ensure that the evaluation criteria are clear, concise, **and** fair so that all potential offerors are fully aware of the bases for proposal evaluation and are given **an equal opportunity to** compete,

(ii) The project officer and the contracting officer should then review the evaluation criteria together to ascertain the following:

(A) The criteria are described in sufficient detail **to** provide the offerors (and evaluators) with a total understanding of the factors to be involved in the evaluation process:

(B) The criteria **address the key programmatic** concerns which the offerors must be aware of in preparing proposals:

(C) The criteria are specifically applicable to the instant acquisition and **are not** merely restatements of criteria from previous acquisitions which are not relevant to this acquisition: and

(D) The criteria **are** selected to represent only the significant **areas** of importance which must be emphasized rather than a

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multitude of factors. (All criteria tend to lose importance if too many are included. Using too many criteria will prove as detrimental as using too few.)

(3) Examples of topics that form a basis for evaluation criteria.

Typical examples of topics that form a basis for the development of evaluation criteria are listed in the following paragraphs. These examples **are** intended to assist in the development of actual evaluation criteria for a specific acquisition and should only be used if they are applicable to that acquisition. They are not to be construed as actual examples of evaluation criteria to **be** included in the RFP.

(if Understanding of the problem and statement of **work**:

(ii) Method of accomplishing the objectives and intent of the statement of work;

(iii) Soundness of the scientific or technical approach for executing the requirements of the statement of work (to include, when applicable, preliminary layouts, sketches, diagrams, other graphic representations, calculations, curves, and other data necessary for presentation, substantiation, justification, or understanding of the approach);

(iv) Special technical factors, such as experience or pertinent novel ideas in the specific branch of science or technology involved;

(v) Feasibility and/or practicality of successfully accomplishing the requirements (to include a statement and discussion of anticipated **major** difficulties and **problem** areas and recommended approaches for their resolution);

(vi) Availability of required special research, test, and other equipment or facilities;

(vii) Managerial capability (ability to achieve delivery or performance requirements as demonstrated **by** the proposed use **of** management and other personnel resources, and to successfully manage the project, including subcontractor and/or consultant efforts', if applicable, as evidenced by

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the management plan and demonstrated by previous experience).

(viii) Availability, qualifications, experience, education, and competence of professional, technical, and other personnel, to include proposed subcontractors and consultants (as evidenced by resumes, endorsements, and explanations of previous efforts); and

(ix) Soundness of the proposed staff time or labor hours, propriety of personnel classifications (professional, technical, others), necessity for type and quantity of material and facilities proposed, validity of proposed subcontracting, and necessity of proposed travel.

(4) Relative importance or weight.

(i) A statement or indication of the relative importance or weight must be assigned to each evaluation criterion to inform prospective offerors (and evaluators) of the specific significance of each criterion in **comparison** to the other criteria. Similarly, if a criterion is subdivided into parts, each of the parts must be assigned a statement or indication of the relative importance or weight.

(ii) The two principal methods used to indicate the relative importance or weight are the numerical score and adjective description. The Department does not prescribe a single method for determining the relative importance or weight, but recommends the use of the numerical score method because it is more precise and informative. However, it is recognized that in some instances the use of the adjective description method may be more appropriate and, hence, may be used when that determination is made.

(iii) Cost or price is not generally included as one of the evaluation criteria and is not assigned an indication of relative importance or weight. However, a statement must be included in the RFP to reflect the relationship of cost or price in comparison to the other criteria. The contracting officer must ensure that this statement accurately reflects the appropriate balance between cost or price and the technical factors. The contracting officer and project officer should work together in arriving at the final determination regarding the relationship. The following are examples of statements that may be used to

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reflect this relationship. However, since these examples represent only the two extremes and the middle position, another statement may be developed to reflect the relationship which applies to the instant acquisition.

o You are advised that paramount consideration shall be given to the evaluation of technical proposals rather than cost or price.

o You are advised that paramount consideration shall be **given to** cost or price rather than the evaluation of technical proposals.

o You are advised that the evaluation of technical **proposals** and cost or price are of approximately equal value.

315.407 Solicitation provisions.

(a) and (b) Reserved.

(c)(1) Reserved.

(2) The referenced provision (FAR 52.215-6, Type of Business Organization) is a representation, has been included under Section **K** (see **315.406-5(a)(2)(iii)**), and need not be restated again.

(3) - (7) Reserved.

(8) The provision at 352.215-12 shall be used in place of that specified at FAR 52.215-12.

(d) - (f) Reserved.

| (g) The referenced provision (FAR 52.215-20, Place of Performance) is to be considered a certification and is included under Section **K** (see **315.406-5(a)(2)(iv)**); it need not be restated again.

| (h) - (m) Reserved.

| (n) The contracting officer shall insert the provision at FAR 52.233-2, Service of Protest, in solicitations as required by FAR 33.106(a).

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315.408 Issuing solicitations.

The minimum proposal preparation or response time between the date of distribution of an RFP and the date set for receipt of proposals shall not be less than 30 calendar days.

315.409 . Pre-proposal conferences.

If a pre-proposal conference is to be held, the provision at 352.215-72 shall be included in the solicitation.

315.410 Amendment of solicitations before closing date.

For additional information on amendments to solicitations, see FAR 15.606.

315.413 Disclosure and use of information before award.

315.413-1 Alternate I.

The Department shall not use Alternate I procedures.

315.413-2 Alternate II.

The Department shall use the Alternate II procedures as modified in this subsection and shall use the provision at 352.215-12, Restriction on Disclosure and Use of Data, rather than the similar provision at FAR **52.215-12** (see **315.407(c)(8)**). Any reference in the FAR to the provision at FAR 52.215-12 shall apply to the provision at 352.215-12.

(a) Reserved.

(b) The term "**data**," as used in this section and in **352.215-12**, refers to trade secrets, business data, and technical data. Trade secrets, within the meaning of 18 U.S.C. 1905, include, for example, processes, formulas, and chemical compositions. Business data includes, for example, commercial information, financial information, and cost and pricing data. Technical data includes, for example, plans, designs, suggestions, improvements and concepts.

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The Department recognizes that requests for proposals may require the offeror, including its prospective subcontractor(s), if any, to submit data which the offeror does not want used *or* disclosed for any purpose other than for evaluation of the proposal. Each proposal containing data which the offeror desires to restrict must be marked on the cover sheet by the offeror with the legend set forth at 352.215-12. Proposals, or portions of proposals, so marked shall be handled in accordance with the provisions of the legend.

(c) Contracting officers receiving proposals which contain restrictive statements or legends not conforming to the referenced provision at 352.215-12 must carefully evaluate the form and substance of the restriction before making a determination to reject the proposal. Deviations in form which do not compromise the Government's rights may be accepted if approved by the activity's FOI official and the Office of General Counsel, Business and Administrative Law Division.

(d) Reserved.

(e) The Government notice shown in FAR 15.413-2(e) shall be used by this Department and is to be placed on the cover sheet of each proposal or quotation upon its receipt. The Government notice shall be completed by adding the following to the end of the last sentence: "HHSAR paragraph 315.608-72."

(f) The Department sometimes finds it necessary (and in some instances is required by law) to seek evaluation of proposals outside the Department (see 315.608-71(f)). All conditions required by FAR 15.413-2(f) have been met and are covered in 315.608-72, Procedures for handling and disclosing proposals. In regard to item (1) of FAR 15.413-2(f), the Department has found that the procedure stated in the first sentence of paragraph (b) of 315.608-72 is best and considers it in compliance with the FAR requirement.

(g) See Subpart 324.2 for detailed procedures concerning FOIA requests.

315.470 Review of RFP.

The principal official responsible for acquisition shall establish procedures to ensure than an independent review of

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the RFP is made between the time the synopsis is sent to the Commerce Business Daily announcing the availability of the RFP and the release date of the RFP. The individual selected to conduct the review must possess the acquisition knowledge necessary to readily ascertain whether the RFP contains the required information to be in conformance with all laws, regulations, and internal procedures and instructions. The individual must be a person other than the preparer of the RFP.

315.471 Annual submission of representations and certifications.

Each principal official responsible for acquisition (**PORA**) shall determine whether to allow the use of the annual submission of representations and certifications by offerors. If allowed, the provisions of FAR 14.213 shall be followed.

Subpart 315.5

Unsolicited Proposals

315.505 Content of unsolicited proposals.

(a) • (c) Reserved.

(d) **Certification** by offeror ~~to ensure against~~ contacts between Department employees and prospective offerors which would exceed the limits of advance guidance set forth in FAR 15.504 **resulting** in an unfair advantage to an offeror, the principal official responsible for acquisition (or designee) shall ensure that the following certification is furnished to the prospective offeror and the executed certification is included as part of the resultant unsolicited proposal:

Unsolicited Proposal Certification by Offeror

This is to certify, to the best of my knowledge and belief, that :

- a. This proposal has not been prepared under Government supervision.
- b. The methods and approaches stated in the proposal were developed by this offeror.
- c. Any contact with employees of the Department of Health and Human Services has been within the limits of appropriate advance guidance set forth in FAR 15.504.
- d. No prior commitments were received from departmental employees regarding acceptance of this proposal.

Date: _____ Organization: _____

Name: _____

Title: _____

(This certification shall be signed by a responsible official of the proposing organization or a person authorized to contractually obligate the organization.)

Unsolicited Proposals

315.506 Agency procedures.

(a) The principal official responsible for acquisition is responsible for establishing procedures to comply with FAR 15.506(a).

(b) The principal official responsible for acquisition or his/her designee shall be the point of contact for -coordinating the receipt and handling of unsolicited proposals. Contacts made outside the contracting activity shall be promptly coordinated with the principal official responsible for acquisition or the designee.

315.506-r Receipt and initial review.

(a) - (c) Reserved.

(d) An unsolicited proposal shall not be refused consideration merely because it was initially submitted as a grant application. However, contracts shall not be awarded on the basis of unsolicited proposals which have been rejected for grant support on the ground that they lack scientific merit.

315.509 Limited use of data.

The legend, Use and Disclosure of Data, prescribed in FAR 15.509(a) is to be used by the offeror to restrict the use of data for evaluation purposes only. However, data contained within the unsolicited proposal may have to be disclosed as a result of a request-submitted pursuant to the **Freedom** of Information Act. Because of this possibility, the **following notice** shall be furnished to all prospective offerors of unsolicited proposals whenever the legend is provided in accordance with FAR 15.504(b)(7):

The **Government** will attempt to comply with the "Use and Disclosure of Data" legend. However, the Government may not be able to withhold a record (data, document, etc.) nor deny access to a **record requested** by an individual (the public) when an obligation is **imposed** on the Government under the **Freedom** of Information Act, 5 U.S.C. 552, as amended. The Government's **determination** to withhold or disclose a record **will** be based upon the particular circumstances involving the record in question and whether the record may be exempted from disclosure under the Freedom of Information Act. Records which the offeror considers to be trade secrets and commercial or financial information and privileged or confidential must be identified by the offeror as indicated in the referenced legend.

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(1) For purposes of this section, nonprofit organizations are defined as those business entities organized and operated **exclusively** for charitable, scientific, or educational purposes, no part of the net earnings of which inure to the benefit of any private shareholder or individual, and which are exempt from Federal income taxation under Section 501 of the Internal Revenue Code.

(2) For contracts with nonprofit organizations where profit is involved, an adjustment of up to 3 percentage points will **be** subtracted from the total profit objective percentage. In developing this adjustment, it will **be** necessary to consider the following factors:

(i) Tax position benefits;

(ii) Granting of financing through advance payments; and

(iii) Other pertinent factors which may work to either the advantage or disadvantage of the contractor in its **position** as a nonprofit organization.

315.905-72 Contractor effort.

(a) General. Contractor effort is a measure of how much the contractor is expected to contribute to the overall effort necessary to meet the contract performance requirement in an efficient manner. This factor, which is apart from the contractor's responsibility for contract performance, takes into account what **resources** are necessary and what the contractor must do to accomplish a conversion of ideas and material into the final service or product called for in the contract. This is a recognition that within a given performance output, or within a given sales dollar figure, necessary efforts on the part of individual contractors can vary widely in both value and quantity, and that the profit objective should reflect the extent and nature of the contractor's contribution to total performance. A major consideration, particularly in connection with experimental, developmental, or research work, is the difficulty or complexity of the work to **be** performed, and the unusual demands of the contract, such as whether the project involves a new approach unrelated to existing technology and/or equipment or only refinements to these items. The evaluation of this factor requires an analysis of the cost content of the **proposed** contract as follows:

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(1) Material acquisition. (Subcontracted items, purchased parts, and other material.) Analysis of these cost items shall include an evaluation of the managerial and technical effort necessary to obtain the required subcontracted items, purchased parts, material or services. The contracting officer shall determine whether the contractor will obtain the items or services by routine order from readily available sources or by detailed subcontracts for which the prime contractor will be required to develop complex specifications. Consideration shall also be given to the managerial and technical efforts necessary for the prime contractor to select subcontractors and to perform subcontract administration functions. In application of this criterion, it should be recognized that the contribution of the prime contractor to its purchasing program may be substantial. Normally, the lowest unadjusted weight for direct material is 2 percent. A weighting of less than 2 percent would be appropriate only in unusual circumstances when there is a minimal contribution by the contractor.

(2) Direct Labor (Professional, service, manufacturing and other labor). Analysis of the various labor categories of the cost content of the contract should include evaluation of the comparative quality and quantity of professional and semiprofessional talents, manufacturing and service skills, and experience to be employed. In evaluating professional and semiprofessional labor for the purpose of assigning profit dollars, consideration should be given to the amount of notable scientific talent **or** unusual or scarce talent needed in contrast to nonprofessional effort. The assessment should consider the contribution this talent will provide toward the achievement of contract objectives. Since nonprofessional labor is relatively plentiful and rather easily obtained by the contractor and is less critical to the successful performance of contract objectives, it cannot be weighted nearly as high as professional or semiprofessional labor. Service contract labor should be evaluated in a like manner by assigning higher weights to engineering or professional type skills and lower weights to semiprofessional or other type skills required for contract performance. Similarly, the variety of manufacturing and other categories of labor skills required and the contractor's manpower resources for meeting these requirements should be considered. For purposes of **evaluation**, categories of labor (i.e., quality control, receiving and inspection, etc.) which do not fall within the definition for professional, service or manufacturing labor may be categorized as appropriate. However, the same evaluation considerations as

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outlined above will be applied.

(3) Overhead and general management (G&A). (i) Analysis of these overhead items of cost should include the evaluation of the makeup of these expenses and how much they contribute to contract performance. To the extent practicable, analysis should include a determination of the amount of labor within these overhead pools and how this labor would be treated if it were considered as direct labor under the contract. The allocable labor elements should be given the same profit considerations that they would receive if they were treated as direct labor. The other elements of these overhead pools should be evaluated to determine whether they are routine expenses, such as utilities and maintenance, and hence given lesser profit consideration, or whether they are significant contributing elements. The composite of the individual determinations in relation to the elements of the overhead pools will be the profit consideration given the pools as a whole. The procedure for assigning relative values to these overhead expenses differs from the method used in assigning values of the direct labor. The upper and lower limits assignable to the direct labor are absolute. In the case of overhead expenses, individual expenses may be assigned values outside the range as long as the composite ratio is within the range.

(ii) It is not necessary that the contractor's accounting system break down overhead expenses within the classifications of research overhead, other overhead pools, and general administrative expenses, unless dictated otherwise by Cost Accounting Standards (CAS). The contractor whose accounting system reflects only one overhead rate on all direct labor need not change its system (if CAS exempt) to correspond with the above classifications. The contracting officer, in an evaluation of such a contractor's overhead rate, could break out the applicable sections of the composite rate which could be classified as research overhead, other overhead pools, and general and administrative expenses, and follow the appropriate evaluation technique.

(iii) Management problems surface in various degrees and the management expertise exercised to solve them should be considered as an element of profit. For example, a contract for a new program for research or an item which is on the cutting edge of the state of the art will cause more problems and require more managerial time and abilities of a higher order than a follow-on

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contract. If new contracts create more problems and require a higher profit weight, follow-ons should be adjusted downward because many of the problems should have been solved. In any event, an evaluation should be made of the underlying managerial effort involved on a case-by-case basis.

(iv) It may not be necessary **for** the contracting officer to make a separate profit evaluation of overhead expenses in connection with each acquisition action for substantially the same project with the same contractor. Where an analysis of the profit weight to be assigned to the overhead pool has been made, that weight assigned may be used for future acquisitions with the same contractor until there is a change in the cost composition of the overhead pool or the contract circumstances, or the factors discussed in (iii) **above** are involved.

(b) other costs. Analysis of this factor should include all other direct costs associated with contractor performance (**e.g.**, travel and relocation, direct support, and consultants). Analysis of these items of cost should include:

(1) The significance of the **cost** of contract performance;

(2) Nature of the cost; and

(3) How much they contribute to contract performance. Normally, travel costs require minimal administrative effort by the contractor and, therefore, usually receive a weight no greater than 1%. Also, the contractor may designate individuals as "consultants" but in reality these individuals may be obtained **by** the contractor to supplement its workforce in the performance of routine duties required **by** contract. These costs would normally receive a minimum weight. However, there will be instances when the contractor **may** be required to locate and obtain the services of consultants having expertise in such fields as medicine or human services. In these instances, the contractor will **be** required to expend greater managerial and technical effort to obtain such services and, consequently, such costs should receive a much greater weight.

315.905-73 Other factors.

(a) Contract cost risk. The contract type employed basically determines the degree of cost risk assumed by the contractor. For example, where a portion of the risk has been shifted to the

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Government through cost-reimbursement provisions, unusual contingency provisions, or other risk-reducing measures, the amount of profit should be less than where the contractor assumes all the risk.

In developing the prenegotiation profit objective, the contracting officer will need to consider the type of contract anticipated to be negotiated and the contractor risk associated therewith when selecting the position in the weight range for profit that is appropriate for the risk to be borne by the contractor. This factor should be one of the most important in arriving at prenegotiation profit objectives.

(1) Evaluation of this risk requires a determination of:

(i) The degree of cost responsibility the contractor assumes;

(ii) The reliability of the cost estimates in relation to the task assumed; and

(iii) The complexity of the task assumed by the contractor. This factor is specifically limited to the risk of contract costs. Thus, such risks on the part of the contractor as reputation, losing a commercial market, risk of losing potential profits in other fields, or any risk which falls on the contracting office such as the risk of not acquiring a satisfactory report, are not within the scope of this factor.

(2) The first and basic determination of the degree of cost responsibility assumed by the contractor is related to the sharing of total risk of contract cost by the Government and the contractor through the selection of contract type. The extremes are a cost-plus-a-fixed-fee contract requiring the contractor to use its best efforts to perform a task and a firm fixed-price contract for a service or a complex item. A cost-plus-a-fixed-fee contract would reflect a minimum assumption of cost responsibility, whereas a firm fixed-price contract would reflect a complete assumption of cost responsibility. Where proper contract selection has been made, the regard for risk by contract type would usually fall into the following percentage ranges:

	<u>Percent</u>
Cost-reimbursement type contracts	0-3
Fixed-price type contracts	2-7

Profit

(3) The second determination is that of the reliability of the cost estimates. Sound price negotiation requires **well-**defined contract objectives and reliable cost estimates. Prior experience assists the contractor in preparing reliable cost estimates on new acquisitions for similar related efforts. An excessive cost estimate reduces the possibility that the cost of performance will exceed the contract price, thereby reducing the contractor's assumption of contract cost risk.

(4) The third determination is that of the difficulty of the contractor's task. The contractor's task can be difficult or **easy**, regardless of the type of contract.

(5) Contractors are likely to assume greater cost risk only if contracting officers objectively analyze the risk incident to proposed contracts and are willing to compensate contractors for it. Generally, a cost-plus-fixed fee contract will not justify a reward for risk in excess of 0.5 percent, nor will a firm fixed-price contract justify a reward of less than the minimum in the structured approach. Where proper contract-type selection has been made, the reward for risk, by contract type, will usually fall into the following percentage ranges:

(i) Type of contract and percentage ranges for profit objectives developed by using the structured approach for research and development and manufacturing contracts:

	<u>Percent</u>
Cost-plus-fixed fee	0 to 0.5
Cost-plus-incentive fee:	
With cost incentive only	1 to 2
With multiple incentives	1.5 to 3
Fixed-price-incentive:	
With cost incentive only	2 to 4
With multiple incentives	3 to 5
Prospective price redetermination	3 to 5
Firm fixed-price	5 to 7

Profit

(ii) Type of contract and percentage ranges for profit objectives developed by using the structured approach for service contracts:

Cost-plus-fixed-fee	0 to 0.5
Cost-plus-incentive fee	1 to 2
Fixed-price incentive	2 to 3
Firm fixed-price	3 to 4

(6) These ranges may not be appropriate for all acquisitions. For instance, a fixed-price-incentive contract that is closely priced with a low ceiling price and high incentive share may be tantamount to a firm fixed-price contract. In this situation, the contracting officer may determine that a basis exists for high confidence in the reasonableness of the estimate and that little opportunity exists for cost reduction without extraordinary efforts. On the other hand, a contract with a high ceiling and low incentive formula can be considered to contain **cost-plus-incentive-fee** contract features. In this situation, the contracting officer may determine that the Government is retaining much of the contract cost responsibility and that the risk assumed by the contractor is minimal. Similarly, if a **cost-plus-incentive-fee** contract includes an unlimited downward (negative) fee adjustment on cost control, it could be comparable to a fixed-price-incentive contract. In such a pricing environment, the contracting officer may determine that the Government has transferred a greater amount of cost responsibility to the contractor than is typical under a normal **cost-plus-incentive-fee** contract.

(7) The **contractor's subcontracting** program may have a significant impact on the contractor's acceptance of risk under a contract form. It could cause risk to increase or decrease in terms of both cost and performance. This consideration should be a part of the contracting officer's overall evaluation in selecting a factor to apply for cost risk. It may be determined, for instance, that the prime contractor has effectively transferred real cost risk to a subcontractor and the contract cost **risk** evaluation may, as a result, be below the range which would otherwise apply for the contract type being proposed. The contract cost risk evaluation should not be lowered, however, merely on the basis that a substantial portion of the contract

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costs represents subcontracts without any substantial transfer of contractor's risk.

(8) In making a contract cost risk evaluation in an acquisition action that involves definitization of a letter contract, unpriced change orders, and unpriced orders under BOA's, consideration should be given to the effect on total contract cost risk as a result of having partial performance before **definitization**. **Under** some circumstances it may be reasoned that the total amount of cost risk has been effectively reduced. under other circumstances it may be apparent that the contractor's cost risk remained substantially unchanged. To be equitable, the determination of profit weight for application to the total of all recognized costs, both those incurred and those yet to be expended, must be made with consideration to all attendant circumstances - not just the portion of costs incurred or percentage of work completed prior to definitization.

(9) Time and material and labor hour contracts will be considered to be cost-plus-a-fixed-fee contracts for the purpose of establishing profit weights unless otherwise exempt under 315.905-70(b) in the evaluation of the contractor's assumption of contract cost risk.

(b) Investment. HHS encourages its contractors to perform their contracts with the minimum of financial, facilities, or other assistance from the Government. As such, it is the purpose of this factor to encourage the contractor to acquire and use its own resources to the maximum extent possible. The evaluation of this factor should include an analysis of the following:

(1) Facilities (Including equipment). To evaluate how this factor contributes to the profit objective requires knowledge of the level of facilities utilization needed for contract performance, the source and financing of the required facilities, and the overall cost effectiveness of the facilities offered. Contractors who furnish their own facilities which significantly contribute to lower total contract costs should be provided with additional profit. On the other hand, contractors who rely on the Government to provide **or** finance needed facilities should receive a corresponding reduction in profit. Cases between the above examples should be evaluated on their merits with either positive or negative adjustments, as appropriate, in profit being made. However, where a highly **facili-**

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tized contractor is to perform a contract which does not benefit from this facilitization or where a contractor's use of its facilities has a minimum cost impact on the contract, profit need not be adjusted. When applicable, the prospective contractor's computation of **facilities capital cost of money** for pricing purposes under CAS 414 can help the contracting officer identify the level of facilities investment to be employed in contract performance.

(2) **Payments.** In analyzing this factor, consideration should be given to the frequency of payments by the Government to the contractor. The key to this weighting is to give proper consideration to the impact the contract will have on the contractor's cash flow. Generally, negative consideration should be given for advance payments and payments more frequent than monthly with maximum reduction being given as the contractor's working capital approaches zero. Positive consideration should be given for payments less frequent than monthly with additional consideration given for a capital turn-over rate on the contract which is less than the contractor's or the industry's normal capital turn-over rate.

(c) **Performance.** (Cost-control and other past accomplishments.) The contractor's past performance should be evaluated in such areas as quality of service or product, meeting performance schedules, efficiency in cost control (including need for and reasonableness of cost incurred), accuracy and reliability of previous cost estimates, degree of cooperation by the contractor (both business and technical), timely processing of changes and compliance with other contractual provisions, and management of subcontract programs. Where a contractor has consistently achieved excellent results in the foregoing areas in comparison with other contractors in similar circumstances, such performance merits a proportionately greater opportunity for profit. Conversely, a poor record in this regard should be reflected in determining what constitutes a fair and reasonable profit.

(d) **Federal socioeconomic programs.** This factor, which may apply to special circumstances or particular acquisitions, relates to the extent of a contractor's successful participation in the Government sponsored programs such as small business, small disadvantaged business, labor surplus area, and energy conservation efforts. The contractor's policies and procedures which energetically support Government socioeconomic programs and achieve successful results should be given positive considerations.

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Conversely, failure **or** unwillingness on the part **of** the contractor to support Government socioeconomic programs should be viewed as evidence of poor performance **for** the purpose of establishing a profit objective.

(e) Special situations.

(1) **Inventive and developmental contributions** The extent and nature of contractor-initiated and financed independent development should be considered in developing the profit objective, provided that the contracting officer has made **a** determination that such effort will benefit the contract. The **importance** of the development in furthering health and human services purposes, the demonstrable initiative **in** determining the need and application **of** the development, the extent of the contractor's cost **risk**, and whether the development cost was recovered directly or indirectly from Government sources should be weighed.

(2) **Unusual pricing agreements.** Occasionally, unusual contract pricing arrangements are **made** with the contractor wherein **it** agrees to cost ceilings, e.g., a ceiling **on** overhead rates for conditions other than those discussed at FAR 42.707. In such circumstances, the contractor should receive favorable consideration in developing the profit objective.

(3) **Negative factors.** Special **situations** need **not** be limited to those which **only** increase profit levels. A negative consideration may **be** appropriate when the contractor is expected to obtain spin-off benefits as a direct result of the contract (**e.g.**, products or services with commercial application).

315.905-74 Facilities capital cost of money.

When facilities capital cost **of** money (**cost** of capital committed to facilities) is included as an item of cost in the contractor's proposal, a reduction in the profit objective shall be made **in** an **amount equal** to the amount **of** facilities capital cost of money allowed **in** accordance with **the** Facilities Capital Cost-of-Money Cost Principal. If the contractor does not propose this cost, a provision must **be** inserted in the contract that facilities capital cost **of** money is not an allowable cost.

Subpart 315.10

Preaward, Award, and Postaward Notifications,
Protests, and Mistakes

315.1000 general.

Once a contract action has progressed through the evaluation process, and even after the selection of a contractor, all queries as to the relative merits of the submitted proposals shall be courteously but firmly directed to the contracting officer:-- ~~All~~ other personnel will avoid any exchange of comments with offerors.

315.1003 Debriefing of unsuccessful offerors.

(a) Any HHS employee who receives either a written or oral request for a debriefing from an unsuccessful offeror shall immediately, without any discussion regarding the merits or deficiencies of the unsuccessful offeror's proposal, refer the request to the contracting officer. If the request is made orally, the contracting officer shall require that the request be made in writing. The contracting officer or his/her designee shall be present at all debriefings and shall review written debriefings prior to release.

(b) A debriefing is intended to: (1) Tell an unsuccessful offeror which areas of its proposal were judged to be weak and deficient and whether the weaknesses or deficiencies were factors in its not having been selected; and

(2) Identify the factors which were the basis for selection of the successful contractor. If the quality of the successful offeror's proposal to satisfy the mission requirement was the basis, the unsuccessful offeror should be so informed, and given a general comparison of significant areas, but not a point-by-point comparison of all the elements considered in the evaluation criteria. If the successful offeror was selected on the basis of cost, the unsuccessful offeror should be told that was the case. If selection was based on other factors, they should be specified.

(c) Reserved.

(d) If an unsuccessful offeror feels that its failure to obtain the award was not justified, it will rely, at least in part, on the information given in the debriefing to determine whether it should seek recourse. Accordingly, it is essential that a debriefing be conducted in a scrupulously fair, objective, and **impartial** manner, and that the information given the unsuccessful offeror be absolutely factual and consistent with the findings of the contracting officer and the basis on which the award was made.

Preaward, Award, and Postaward Notifications,
Protests, and Mistakes

(e) In some cases, it may be necessary to arrange informal debriefings for an unsuccessful offeror's personnel by departmental technical evaluators. This determination will be made by, and meeting arrangements will be the responsibility of, the contracting officer.

(f) It is very important that all departmental personnel engaged in the evaluation and selection processes be aware of the policies and procedures in FAR Subpart 15.10 and this Subpart 315.10. Detailed and complete records of the acquisition will be maintained by key technical and contracting personnel in a manner which will facilitate either a written or an oral debriefing of any unsuccessful offeror.

315.1004 Protests against award.

See Subpart 333.1

315.1005 Discovery of mistakes.

See 314.406 and 315.607.

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(5) A brief description of the general evaluation approach.

(c) The technical evaluation plan must be signed by an official within **the program** office in a **position** at least one level above the project officer or in accordance with contracting activity procedures.

(d) The technical evaluation plan should be submitted to the contracting officer for review and approval before the solicitation is issued. The contracting officer shall make sure that the principal factors relating to the evaluation are reflected in the evaluation criteria when conducting the review of the plan.

3X5.608-71 Technical evaluation panel.

(a) ~~General~~ technical evaluation panel is required for all acquisitions applicable to this subpart which are expected to exceed \$300,000. The contracting officer has the discretion to require a technical evaluation panel for acquisitions not exceeding \$300,000 based on the complexity of the acquisition.

(2) The technical evaluation process requires careful consideration regarding the size, composition, expertise, and function of the technical evaluation panel. The efforts of the panel can result in the success or failure of the acquisition.

(b) Role of the project officer. (1) The project officer is the contracting officer's **technical representative** for the acquisition action. The project officer may be a voting member of the technical evaluation panel, and may also serve as the chairperson of the panel, unless he/she is prohibited by law or contracting activity procedures.

(2) The project officer is responsible for recommending panel members who are knowledgeable in the technical aspects of the acquisition and who are competent to identify strengths and weaknesses of the various proposals. The program training requirements specified in 307.170 must be adhered to when selecting prospective panel members.

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(3) The project officer shall ensure that persons possessing expertise and experience in addressing issues relative to sex, race, national origin, and handicapped discrimination be included as panel members in acquisitions which address those issues. The intent is to balance the composition of the panel so that qualified and concerned individuals may provide insight to other panel members regarding ideas and approaches to be taken in the evaluation of proposals.

(4) The project officer is to submit the recommended list of panel members to an official within the program office in a position at least one level above the project officer or in accordance with contracting activity procedures. This official will review the recommendations, appoint the panel members, and select the chairperson.

(5) The project officer shall arrange for adequate and secure working space for the panel.

(c) Role of the contracting officer. (1) The contracting officer is the Department's official **representative** with delegated acquisition authority to enter into and administer contracts. The term "contracting officer," as used in this subpart, may be the contracting officer or his/her designated representative within the contracting office.

(2) The contracting officer shall not serve as a member of the technical evaluation panel but should be available to:

(i) Address the initial meeting of the technical evaluation panel (see **315.608-74(c)**);

(ii) Provide assistance to the evaluators as required; and

(iii) Ensure that the scores adequately reflect the written technical evaluation **report** comments (see **315.608-76**).

(d) Conflict of interest. (1) If a panel member has an actual or apparent conflict of interest related to a proposal under evaluation, he/she shall be removed from the panel and replaced with another evaluator. If a suitable replacement is not available, the panel shall perform the review without a replacement.

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(2) For the purposes of this subpart, conflicts of interest are defined in the Department's Standards of Conduct set forth in 45 CFR 73 which incorporates 5 CFR 737, Post **Employment** Conflict of Interest. The Standards of Conduct shall be **applicable** to both in-house personnel and outside evaluators serving on the technical evaluation panel.

(e) Continuity of evaluation process. (1) The technical evaluation panel is responsible for evaluating the original proposals, making recommendations to the chairperson regarding clarifications and deficiencies of proposals, and, if required by the contracting officer, assisting the contracting officer during discussions and negotiations, and reviewing supplemental, revised and/or "best and final" offers. To the extent possible, the same evaluators should be available throughout the entire evaluation and selection process to ensure continuity and consistency in the treatment of proposals. The following are examples of circumstances when it would not be necessary for the technical evaluation panel to evaluate **revised** proposals submitted during the acquisition:

(i) The answers to questions do not have a substantial impact on the proposal (see **315.609(i)**);

(ii) The "best and final" offers are not materially different **from** the original proposals; or

(iii) The rankings of the offerors are not affected because the revisions to the proposals are relatively minor.

(2) The chairperson, with the concurrence of the contracting officer, may decide not to have the panel evaluate the revised proposals. Whenever this decision is made, it must be fully documented by the chairperson and approved by the contracting officer.

(3) When technical evaluation panel meetings **are** considered necessary by the **contracting** officer, the attendance of evaluators is mandatory. When the chairperson determines that an evaluator's failure to attend the meetings is prejudicial to the evaluation, the chairperson shall replace the individual after discussing the situation with the contracting officer and obtaining his/her concurrence and the approval of the program official responsible for appointing the panel members (see 315.608-71(b)(4)).

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(4) Whenever continuity of the evaluation process is not possible, and either new evaluators are selected or a reduced panel is decided upon, each proposal which is being reviewed at any stage of the acquisition shall be reviewed at that stage by all members of the revised panel unless it is impractical to do so because of the receipt of an unusually large number of proposals.

(f) Use of outside evaluators... (1) The technical evaluation panel shall be composed of **Government** employees except when outside **evaluators** possess a required expertise which is not available within the Government, or as required by law.

(2) The National Institutes of Health (NIH) and the Alcohol, Drug Abuse, and Mental Health Administration (**ADAMHA**) are required to have a peer review of research and development contracts in accordance with Public Law (P.L.) 93-352 as amended by P.L. **94-63**; 42 U.S.C. 289 l-4. This legislation requires peer review of projects and proposals, and not more than one-fourth of the members of a peer review group may be officers or employees of the United States. NIH and **ADAMHA** are therefore exempt **from** the provisions of **315.608-71** to the extent that 42 U.S.C. 289 l-4 applies.

315.608-72 Procedures for handling and disclosing proposals.

(a) The procedures and notice specified in FAR **15.413-2** and **315.413-2** shall be used in handling solicited proposals and for disclosing proposals outside the Government for evaluation purposes. (For unsolicited proposals, see FAN 15.509 and 315.509.)

(b) Decisions to disclose proposals outside the Government for evaluation purposes shall be made by the chief official having **programmatic** responsibility for the acquisition, after consultation with the contracting officer and in accordance with operating division procedures. The decision to disclose either a solicited or unsolicited proposal outside the Government for the purpose of obtaining an evaluation shall take into consideration the avoidance of organizational conflicts of interest and any competitive relationship between the submitter of the proposal and the prospective evaluator(s).

(c) When it is determined to disclose a solicited proposal outside the Government for evaluation purposes, the following or similar conditions shall be included in the written agreement with the

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evaluator(s) prior to disclosure (see FAR **15.413-2(f)** and 315.413-2(f)). Also, a review must be made to ensure that the notice required by FAR **15.413-2(e)** is affixed to the proposal before it is disclosed to the evaluator(s).

CONDITIONS **FOR** EVALUATING PROPOSALS

The evaluator agrees to use the data (trade secrets, business data, and technical data) contained in the proposal only for evaluation purposes.

This requirement does not apply to data obtained from another source without restriction.

Any notice or legend placed on the proposal by either the Department or the submitter of the proposal shall be applied to any reproduction or abstract provided to the evaluator or made by the evaluator. Upon completion of the evaluation, the evaluator shall return the Government furnished copy of the proposal or abstract, and all copies thereof, to the Departmental office which initially furnished the proposal for evaluation.

Unless authorized by the Department's initiating office, the evaluator shall not contact the submitter of the proposal concerning any aspects of its contents.

The evaluator will be obligated to obtain **commitments** from its employees and subcontractors, if any, in order to effect the purposes of these conditions.

315.608-73 Receipt of proposals.

(a) After the closing date set by the solicitation for the receipt of proposals, the contracting officer will use a transmittal memorandum to forward the technical proposals to the project officer or chairperson for evaluation. The business proposals will be retained by the contracting officer for evaluation (see 315.608-77).

(b) The transmittal memorandum to the chairperson shall include at least the following:

- (1)** A list of the names of the organizations submitting proposals;
- (2)** A reference to 315.604(d) on the need to preserve the integrity of the source selection process;

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(3) A requirement for a technical evaluation report in accordance with **315.608-76**; and

(4) The establishment of a date **for receipt** of the technical evaluation report.

315.608-74 Convening the technical evaluation panel.

(a) Normally, the technical evaluation panel will convene to evaluate the proposals. However, there may be situations when the contracting officer determines that it is not feasible for the panel to convene. Whenever this decision is made, care must be taken to assure that the technical review is closely monitored to produce acceptable results.

(b) When a panel is convened, the chairperson is responsible for the control of the technical proposals provided to him/her by the contracting officer for use during the evaluation process. The chairperson will generally distribute the technical proposals at the initial panel meeting and will establish procedures for securing the proposals whenever they are not being evaluated to insure their confidentiality. After the evaluation is complete, all proposals **must** be returned to the contracting officer, destroyed, or filed in an appropriate manner to maintain the confidential nature of the data.

(c) The contracting officer shall address the **initial** meeting of the panel and state the basic rules for conducting the evaluation. The contracting officer shall provide written guidance to the panel if he/she is unable to attend the initial panel meeting. The guidance should include:

(1) Explanation of conflicts of interest (see **315.608-71(d)**);

(2) The necessity to read and understand the solicitation, especially the statement of work and evaluation criteria, prior to reading the proposals;

(3) The need for evaluators to restrict the review to only the **solicitation** and the contents of the technical proposals;

(4) The need for each evaluator to review all the proposals;

(5) The need to watch for ambiguities, inconsistencies, errors, and deficiencies which should be surfaced during the evaluation process;

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(6) An explanation of the evaluation process and what will be expected of the evaluators throughout the process;

(7) The need for the evaluators to be aware of the requirement to have complete written documentation of the individual strengths and weaknesses which affect the scoring of the proposals; and

(8) An instruction directing the evaluators that, until the award is made, information concerning the acquisition must not be disclosed to any person not directly involved in the evaluation process.

315.608-75 Rating and ranking of proposals.

The evaluators will individually read each proposal, describe tentative strengths and weaknesses, and develop preliminary scores in relation to each evaluation criterion set forth in the solicitation. The evaluators will use the rating sheets either in the technical evaluation plan or approved by the contracting officer when a technical evaluation plan is not required (see 3X.608-70). After this has been accomplished, the evaluators shall discuss in detail the individual strengths and weaknesses described by each evaluator and, if possible, arrive at a **common** understanding of the major strengths and weaknesses and the potential for correcting each offeror's **weakness(es)**. Each evaluator will score each proposal, and then the technical evaluation panel will collectively rank the proposals. generally, ranking will be determined by adding the numerical scores assigned to the evaluation criteria and finding the average for each offeror. The evaluators should then identify whether each proposal is acceptable or unacceptable. Predetermined cutoff scores shall not be employed.

315.608-76 Technical evaluation report.

A technical evaluation report shall be prepared and furnished to the contracting officer by the chairperson and maintained as a permanent record in the contract file. The report must reflect the ranking of the proposals and identify each proposal as acceptable or unacceptable in accordance with **315.608-75**. The report must also include a narrative evaluation specifying the strengths and weaknesses of each proposal, a copy of each rating sheet, and any reservations, qualifications, or areas to be addressed that might bear upon the selection of sources for negotiation and award. Concrete technical reasons supporting a determination of unacceptability with regard to any proposal must be included. The report should also include specific points and questions which are to be raised in discussions or negotiations.

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315.608-77 Evaluation of business proposals.

(a) The contracting officer shall evaluate the business proposals concurrently with the evaluation of the technical proposals. The contracting officer must adhere to the requirements for cost or price analysis included in FAR 15.805-1 for each business proposal in the competitive range. An audit report may be required in accordance with FAR 15.805-5 and 315.805-S. The contracting officer *must* determine the extent of analysis in each case depending on the amount of the proposal, the technical complexity and related cost or price, and cost realism. The contracting officer should request the project officer to analyze such items as the number of labor hours proposed for various labor categories; the mix of labor hours and categories of labor *in* relation to the technical requirements of the project; the kinds and quantities of material, equipment, and supplies; types, numbers, and hours/days of proposed consultants; logic of proposed subcontracting; analysis of the travel proposed including number of trips, locations, purpose, and travelers; and kinds and quantities of data processing. The project officer shall provide his/her opinion as to whether these elements are necessary and reasonable for efficient contract performance. Exceptions to proposed elements shall be supported by adequate rationale to allow for effective negotiations. The contracting officer should also request the assistance of a cost/price analyst when considered necessary. In all cases, the negotiation memorandum (see 315.672) must include the rationale used in determining that the price or cost is fair and reasonable.

(b) The contracting officer must appraise the management capability of the offeror to perform the required work in a timely manner. **In** making this appraisal, the contracting officer should consider factors such as the offeror's management organization, past performance, reputation for reliability, availability of the required facilities, and cost controls. This information is to be used by the contracting officer to determine the offeror's responsibility.

315.609 Competitive range.

(a) A proposal must be included in the competitive range unless there is no real possibility that it can be improved to the point where it becomes the most acceptable.

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(b) - (d) Reserved.

(e) In certain circumstances, when deciding which proposals should be included in the competitive range, the contracting officer may request that the technical evaluation panel review the cost or price data. Typical situations which may necessitate this review include a suspected "buy-in," large differences in cost or price among the proposals, proposals receiving high technical ratings which have relatively high costs, and proposals receiving low technical ratings which have relatively low costs. The resultant comparison of cost or price to technical factors and the determination of cost or price realism should assist the contracting officer in deciding which proposals are to be included in the competitive range.

(f) All determinations regarding the inclusion or exclusion of proposals in the competitive range must be completely documented, including the salient reasons for the determinations, and set forth in the negotiation memorandum.

(g) Some of the factors which the contracting officer should consider in determining the competitive range are:

(1) The relative importance of cost or price as compared to technical factors in accordance with the solicitation provisions required in **315.406-5(c)**;

(2) The susceptibility of significantly reducing a proposal with an unreasonable high price or cost without undermining the technical merit if the offeror otherwise has a reasonable chance to receive an award; and

(3) The likelihood of reducing cost or price of a proposal which exceeds the Government's requirements.

(h) The contracting officer shall conduct a thorough review of the technical evaluation report to be assured that:

(I) All determinations of unacceptability are supported by concrete and comprehensive statements that are factual and convincing and are consistent with the evaluation criteria set forth in the solicitation. Every statement should be reviewed carefully to eliminate any doubts as to the unacceptability of a proposal;

(2) All **recommendations** to exclude proposals from the competitive range are supported by persuasive rationale and sufficient facts to substantiate a judgment that meaningful discussions are not possible or there is no reasonable chance of the proposal being selected for award;

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(3) Those cases where only one organization is found to be technically acceptable are fully scrutinized; and

(4) Unacceptable proposals contain "information" deficiencies which are so material as to preclude any possibility of upgrading the proposal to a competitive level except through major revisions and additions which would be tantamount to the submission of another proposal.

(i) The contracting officer and project officer should discuss the uncertainties and/or deficiencies that are included in the technical evaluation report for each proposal in the competitive range. Technical questions should be developed by the project officer and/or the technical evaluation panel and should be included in the technical evaluation report. The management and cost or price questions should be prepared by the contracting officer with assistance from the project officer and/or panel as required. The method of requesting offerors in the competitive range to submit the additional information will vary depending on the complexity of the questions, the extent of additional information requested, the time needed to analyze the responses, and the time frame for making the award. However, to the extent practicable, all questions and answers should be in writing. Each offeror in the competitive range shall be given an equitable period of time for preparation of responses to questions to the extent practicable. The questions should be developed so as to disclose the ambiguities, uncertainties, and deficiencies of the offeror (see FAR 15.610(c)).

315.610 Written or oral discussions.

(a) Reserved.

(b) The contracting officer, with the support of personnel who evaluated the technical proposals, and, if necessary, cost analysts, attorneys, etc., must conduct written or oral discussions with all responsible offerors within the competitive range.

(c) Reserved.

(d) Careful judgment must be exercised in determining the extent of discussions. In some cases, more than one round of discussions with all the offerors within the competitive range may be required. The time available, the expense and administrative limitations, and the complexity, size, and significance of the acquisition should all be considered in deciding on the type, duration, and depth of the discussions.

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315.611 Best and final offers.

(a) Reserved.

(b) (1) through (4) Reserved.

(5) Notice that confirmation of a prior offer should be specifically stated as a final offer; and

(6) Notice that all revisions to former offers should be submitted on Standard Form **1411**, Contract Pricing Proposal Cover Sheet, and should be fully documented.

(c) "Best and **final**" offers are subject to a final evaluation of price or cost and other salient factors by the contracting officer and project officer with assistance from a cost/price analyst, and an evaluation of technical factors by the technical evaluation panel, as necessary. Proposals may be technically **rescored** and reranked by the technical evaluation panel and a technical evaluation report prepared. To the extent practicable, the evaluation shall be performed by the same evaluators who reviewed the **original** proposals (see 315.670).

(d) Reserved.

(e) Of particular **importance** in the award of research or development contracts, including those with educational institutions, is the competence of key personnel in the specific field of science or technology involved, as reflected in the proposal. However, awards should not be made for research and development capabilities that exceed those needed for the successful performance of the particular project.

351.670 Negotiation with the selected source.

(a) After selection of the successful proposal, a limited negotiation with the selected offeror may be conducted if deemed necessary. However, no factor which could have any effect on the selection process may be introduced into the negotiation after the **common** cutoff date for receipt of best and final offers.

The negotiation shall not in any way prejudice the competitive interests or right of the unsuccessful offerors. Negotiation with the selected offeror shall be restricted to definitizing the final agreement on terms and conditions; e.g., assuming none of these factors were involved in the selection process, negotiation could include such topics as payment provisions, patent rights, rights in data, property

Source Selection

provisions, labor rates, indirect cost rates, and fees. Prior to conducting the limited negotiation, the contracting officer shall approve a written **determination** citing both the specific issues to be discussed and the rationale showing that the negotiations shall not have any effect on the selection process.

(b) Caution must be exercised by the contracting officer to insure that the negotiation is not used to change the requirement contained in the solicitation, nor to make any other changes which would impact on the source selection decision. Whenever a material change occurs in the requirements as a result of the negotiation, the competition must be reopened and all offerors submitting "best and final" offers must be given an opportunity to resubmit proposals based on the revised requirements. Whenever there is a question as to whether a change is material, the contracting officer should obtain the advice of technical personnel and legal counsel before reopening the competition. Significant changes in the offeror's cost proposal may also necessitate a reopening of competition if such changes alter the factors involved in the original selection process.

(c) Should negotiations beyond those specified in (a) above be required for any reason, discussions must be reopened with all offerors submitting "best and final" offers.

(d) Upon completion of the negotiation, the contracting officer should obtain a confirmation letter from the successful offeror which includes **any** revisions to the technical proposal, the agreed to price or cost, and, **as** applicable, a certificate of current cost or pricing data.

315.671 Post negotiation contract preparation and award.

(a) The contracting officer must perform the following actions after negotiations have been completed:

- (1) Prepare the negotiation memorandum in accordance with 315.672;
- (2) Prepare the contract containing all agreed to terms and conditions and clauses required by law or regulation;
- (3) Include in the contract file the pertinent documents referenced in FAR 4.803; and
- (4) Obtain the appropriate approval of proposed contract awards in accordance with Subpart 304.71 and contracting activity procedures.

Source Selection

(b) After receiving the required approvals, the contract should be transmitted to the prospective contractor for signature. The prospective contractor must be informed that the contract is not effective until accepted by the contracting officer.

(c) The contract shall not be issued until the finance office certifies that the funds are available for obligation.

315.672 Preparation of negotiation memorandum.

The negotiation memorandum or **summary** of negotiations is a complete record of all actions leading to award of a contract and is prepared by the contract negotiator. It should be in sufficient detail to explain and support the rationale, judgments, and authorities upon which all actions were predicated. The memorandum will document the negotiation process and reflect the negotiator's actions, skills, and judgments in concluding a satisfactory agreement for the Government. Negotiation memorandums shall contain discussion of the following or a statement of nonapplicability; however, information already contained in the contract file need not be reiterated. A reference to the document which contains the required information is satisfactory.

(a) Description of articles and services and period of performance.

A description of articles and services, quantity, unit price, total contract amount, and period of contract performance should be set forth (if Supplemental Agreement--show previous contract amount as revised, as well as information with respect to the period of performance).

(b) Acquisition planning. **Summarize** any acquisition planning activities that have taken place. Include items such as meetings with program and staff personnel and the development of acquisition planning schedules.

(c) Synopsis of proposed acquisition. A statement as to whether the acquisition has or has not been publicized in accordance with **FAR** Subpart 5.2. A brief statement of explanation should be included with reference to the specific basis for exemption under the FAR, if applicable.

(d) Contract type. Provide sufficient detail to support the type of contractual instrument recommended for the acquisition and cite any required D & F. If the contract is a cost-sharing type, explain the essential cost-sharing features.

Source Selection

(e) Extent of competition. The extent to which full **and open** competition was solicited and obtained must be discussed.. **The** discussion shall include the date of solicitation, sources solicited, and solicitation results. If a late proposal was received, discuss whether or not the late proposal was evaluated and the rationale for the decision. If the acquisition is to be awarded without full and open competition, discuss the rationale for the decision.

(f) Technical evaluation. **Summarize** the results presented in the technical evaluation report and delineate the basis of acceptability or unacceptability of the proposals **from** a technical standpoint. Discussion should be in nontechnical terms.

(g) Business evaluation. **Summarize** the results presented in the business report and delineate the basis for the determination of acceptability or unacceptability of the business proposals.

(h) Competitive range. If full and open competition, describe how the zone of consideration or competitive range was determined and state the offerors who were included in the competitive range and the ones who were not. Explain why any offeror who submitted a technically acceptable proposal was not included in further discussions. **Comment** on any changes made in the offeror's proposal as a result of the discussions.

(i) Cost breakdown and analysis. Include a complete cost breakdown together with the negotiator's analysis of the estimated cost by individual cost elements. The negotiator's analysis should contain such information as:

(1) A comparison of cost factors proposed in the instant case with actual cost factors used in earlier contracts, **using** the same cost centers of the same supplier or cost centers of other sources having recent contracts for the same or similar item.

(2) Any pertinent Government-conducted audit of the proposed contractor's records of any pertinent cost advisory report (see **FAR** 15.805).

(3) Any pertinent technical evaluation inputs as to necessity, allocability and reasonableness of labor, material and other direct expenses.

Source Selection

(4) Any other pertinent information to fully support the basis for and rationale of the cost analysis.

(5) If the contract is an incentive type, discuss the rationale for the following:

(i) Cost-plus-award-fee.

(A) Base fee.

(B) Maximum fee.

(C) Award fee.

(ii) Cost-plus-incentive-fee.

(A) Minimum fee.

(B) Target fee.

(C) Maximum fee.

(D) Incentives relative to performance and/or delivery.

(E) Sharing ratios.

(iii) Fixed-price incentives.

(A) Target profit.

(B) Target price.

(C) Ceiling price.

(D) Sharing ratios.

(E) Incentives relative to performance and/or delivery.

(6) A justification of the reasonableness of the proposed contractor's estimated profit or fixed fee, considering such factors as any competitive elements, established efficiency or performance, extent of the risk assumed by the proposed contractor, character of the proposed contractor's normal business, the extent of subcontracting in the instant case and the reasons, capital employed, and other factors as are appropriate, including type of organization.

Source Selection

(j) Government-furnished property and Government-provided facilities.

With respect to Government-furnished material or Government-provided facilities, equipment, tooling, or other property, include the following: (A separate D & F is required for facilities construction.)

(1) Where no property is to be provided, a statement to that effect.

(2) Where property is to be provided, a full description, the estimated dollar value, the basis-of price' comparison with competitors, and the basis of rental charge, if rental is involved.

(3) Where the furnishing of any property or the extent has not been determined and is left open for future resolution, a detailed explanation.

(k) Negotiations. Include a statement as to the date and place negotiations were conducted, and identify members of both the Government and contractor negotiating teams by area of responsibility. Include negotiation details relative to the statement of work, terms and conditions, and special provisions. The results of cost or price negotiations must include the information required by FAR 31.109 and 15.808. In addition, if cost or pricing data was required to be submitted and certified, the negotiation record must also contain the extent to which the contracting officer relied upon the factual cost or pricing data submitted and used in negotiating the cost or price.

(1) Other considerations. Include coverage of areas such as:

(1) Financial data with respect to a contractor's capacity and stability.

(2) Determination of contractor responsibility.

(3) Details as to why the method of payment, such as progress payment, advance payment, etc., is necessary. Also cite any required D & F's.

(4) Information with respect to obtaining of a certificate of current cost or pricing data.

(5) Other required special approvals, such as those referenced in 307.105-2.

Source Selection

(6) If the contract represents an extension of previous work, the status of funds and performance under the prior contract(s) should be reflected. Also, a determination should be made that the Government has obtained enough actual or potential value from the work previously performed to warrant continuation with the same contractor. (Project officer should furnish the necessary information.)

(7) If the contract was awarded by full and open competition, state where the unsuccessful offerors' proposals are filed.

(8) State that equal opportunity provisions of the proposed contract have been explained to the contractor, and it is aware of its responsibilities. Also state whether or not a clearance is required.

(9) If the contract is for services, a statement must be made, in accordance with FAR 37.103 and 337.103, that the services to be acquired are nonpersonal in nature.

(m) Terms and conditions. Identify the general provisions and any special clauses and conditions that are contained in the contract, such as option arrangements, incremental funding, anticipatory costs, deviations from the standard clauses, etc. The basis and rationale for inclusion of any special terms and conditions **must** be stated and, where applicable, the document which granted approval for its use identified.

(n) Recommendation. A brief statement setting forth the recommendations for award.

(o) Signature. The memorandum **must** be signed by the contract negotiator who prepared the memorandum.

Subpart 315.6

Source ~~Se~~lection

315.602 Applicability.

(a) Reserved.

(b) This subpart does not apply to contracts for architect-engineer services or contracts awarded to the Small Business Administration under section 8(a) of the Small Business Act.

315.604 Responsibilities.

(a9 - (c) Reserved.

(d) Personnel participating in the evaluation process must not discuss or reveal information concerning the evaluations except to an individual participating in the same evaluation proceedings, and then only to the extent that the information is required in connection with the proceedings. Divulging information during the evaluation, selection, and negotiation phases of the acquisition to offerors or to personnel not having a need to know could jeopardize the resultant award. Therefore, the contracting officer must instruct personnel participating in the evaluations to observe these restrictions and insure that all personnel understand that unauthorized disclosure of information, no matter how innocent, could compromise the acquisition process and is prohibited.

(e) Only the contracting officer or his/her authorized representative within the contracting office shall conduct discussions with offerors relative to any aspect of the acquisition.

315.605 Evaluation factors.

(a) - (d) Reserved.

(e) The evaluation criteria included in the solicitation serve as the standard against which all proposals are evaluated. Prospective offerors rely upon the evaluation criteria in the solicitation in developing proposals, and they must be assured that the evaluation is conducted in accordance with those criteria. All personnel involved in the evaluation process must make sure that the evaluation criteria contained in the solicitation are the only criteria used in conducting the evaluation. See FAR ~~15.406-5(c)~~ and ~~315.406-5(c)~~ for detailed guidance on evaluation criteria.

Source Selection

315.607 Disclosure of mistakes before award.

(a) The contracting officer shall require that offerors' clarifications are in writing.

(b) Reserved.

(c) (1) and (2) Resewed.

(3) The chief of the contracting office is authorized to make the written determination permitting a correction of a mistake in a proposal.

315.608 Proposal evaluation.

(a)(1) Cost or price evaluation. (See **315.608-77.**)

(2) Technical evaluation. (See 315.608-75 and 76.)

(b) The determination required by FAR 15.608(b) shall be made by the chief of the contracting office.

315.608-70 Technical evaluation plan.

(a) A technical evaluation plan may be required by the contracting officer, at his/her discretion, when an acquisition is sufficiently complex as to warrant a formal plan.

(b) The technical evaluation plan should include at least the following:

(1) A list of technical evaluation panel members, their organizations as well as a list of their major consulting clients (if applicable), their qualifications, and curricula vitae (if available);

(2) A **justification** for using non-Government technical evaluation panel members. (Justification is not required if non-Government evaluators will be used in accordance with standard contracting activity procedures or policies);

(3) A statement that there is no apparent or actual conflict of interest regarding any panel member;

(4) A copy of each rating sheet, approved by the contracting officer, to be used to assure consistency with the evaluation criteria; and

Profit

the acquisition being considered. This objective should realistically reflect the total overall task to be performed and the requirements placed on the contractor.

(2) Development of a profit objective should not begin until the following actions have been accomplished:

(i) A thorough review of proposed contract work:

(ii) A review of all available knowledge regarding the contractor pursuant to FAR Subpart 9.1, including audit data, preaward survey reports and financial statements, as appropriate; and

(iii) An analysis of the contractor's cost estimate and comparison with the Government's estimate or projection of cost.

315.905-71 Profit factors.

(a) The following factors shall be considered in all cases in which profit is to be negotiated. The weight ranges listed after each factor shall be used in all instances where the structured approach is used.

Profit factors

Weight ranges

Contractor effort,

Material acquisition	1 to 5 %
Direct labor	4 to 15 %
Overhead	4 to 9 %
General management (G&A)	4 to 8 %
Other costs	1 to 5 %

Other factors

Cost risk	0 to 7 %
Investment	-2 to +2 %
Performance	-1 to +1 %
Socioeconomic programs	-.5 to +.5 %
Special situations	

Profit

(b) Under the structured approach, the contracting officer shall first measure "Contractor Effort" by the assignment of a profit percentage within the designated weight ranges to each element of contract cost recognized by the contracting officer. The amount calculated for the cost of money for facilities capital is not to be included for the computation of profit as part of the cost base.

(c) The suggested categories under "Contractor **Effort**" are for reference purposes only. Often individual proposals will be in a different format, but since these categories are broad and basic, they provide sufficient guidance to evaluate all other items of cost.

(d) After computing a total dollar profit for "Contractor Effort," the contracting officer shall then calculate the specific profit dollars assigned for cost risk, investment, performance, socioeconomic programs, and special situations. This is accomplished by multiplying the total Government Cost Objective, exclusive of any cost of money for facilities capital, by the specific weight assigned to the elements within the "Other **Factors**" category. Form **HHS-674**, Structured Approach Profit/Fee Objective, should be used, as appropriate, to facilitate the calculation of this profit objective. Form HHS-674 is illustrated in 353.370-674.

(e) In making a judgment of the value of each factor, the contracting officer should be governed by the definition, description, and purpose of the factors together with considerations for evaluating them as set forth in 315.905-72 and 315.905-73.

(f) The structured approach was designed for arriving at profit objectives for other than nonprofit organizations. However, if appropriate adjustments are made to reflect differences between profit and nonprofit organizations, the structured approach can be used as a basis for arriving at profit objectives for nonprofit organizations. Therefore, the structured approach, as modified in paragraph (2) below, shall be used to establish profit objectives for nonprofit organizations.

Subpart 315.8

Price Negotiation

315.804 Cost or pricing data.

315.804-3 Exemptions from or waiver of submission of certified cost or pricing data.

(i) Waiver for exceptional cases. The authority referenced in FAR ~~15.804-3(i)~~ may be delegated to the principal Official responsible for acquisition.

315.805 Proposal analysis.

315.805-5 Field pricing support.

(a) (1) Reserved.

(2) When some or all information sufficient to determine the reasonableness of the proposed cost or price is already available or can be obtained by phone from the cognizant audit agency, contracting officers may request less-than-complete field pricing support (**specifying** in the request the information needed) or may waive in writing the requirement for audit and field pricing support by documenting the file to indicate what information is to be used instead of the audit report and the field pricing report.

(b) Reserved.

(c) (1) **When** initiating audit and field pricing support, the contracting officer shall do so by sending a request to the cognizant administrative contracting officer (ACO), with an information copy to the cognizant audit office. When field pricing support is not available, the contracting officer shall initiate an audit by sending, in accordance with agency procedures, two (2) copies of the request to the **OIG** Office of Audits' Regional Audit Director. **In** both cases, the contracting officer shall, in the request:

(i) Prescribe the extent of the support needed;

(ii) State the specific areas for which input is required;

Price Negotiation

(iii) Include the information necessary to perform the review (such as the offeror's proposal and the applicable portions of the solicitations, particularly those describing requirements and delivery schedules);

(iv) Provide the complete address of the location of the offeror's financial records that support the proposal;

(v) Identify the office having audit responsibility if other than an HHS Regional Audit Office; and

(vi) Specify a due date for receipt of a verbal report to be followed by a written audit report. (If the time available is not adequate to permit satisfactory coverage of the proposal, the auditor shall so advise the contracting officer and indicate the additional time needed.) Normally, the Office of Audits will need 30 days after receipt of the proposal for submission of oral results. However, the Office of Audits' ability to conduct reviews by the due date will be influenced by the **OPDIV's** ability to properly plan its acquisitions. If the Office of Audits requires additional time to conduct the review, the contracting officer has the option, at the time the auditor acknowledges receipt of the request, to accept the revised due date or cancel the request and use cost advisory services within the agency to satisfy the requirement. In such cases, the contracting officer shall **immediately** advise the **OIG/OA/Regional** Audit Director and the **OIG/OA/Division of Audit Coordination (OIG/OA/DAC)** of the revised due date or cancellation of the request.

(2) and (3) Reserved.

(4) One copy of the audit request letter that was submitted to the Regional Audit Director and a complete copy of the contract price proposal shall be submitted to **OIG/OA/DAC**.

(5) Whenever, an audit review has been conducted by the Office of Audits, two (2) copies of the memorandum of negotiation shall be forwarded to **OIG/OA/DAC** by the contracting officer (see FAR 15.808(b)).

Subpart 315.9

Profit

315.900 Scope of subpart.

This subpart -

(a) and (b) Reserved.

(c) Prescribes a structured approach for establishing the profit or fee portion of the Government prenegotiation objective in all contracts requiring cost analysis except as stated in 315.905-70(b). The profit analysis factors set forth at FAR 15.905 shall be used in all excepted contracts requiring cost analysis.

315.905-70 Structured approach.

(a) General.

(1) The structured approach for determining profit or fee (hereafter referred to as profit) provides contracting officers with a technique that will ensure consideration of the relative value of the appropriate profit factors described in 315.905-71 in the establishment of a profit objective for the conduct of negotiations. The contracting officer's analysis of these profit factors is based on information available to him/her **prior to** negotiations. Such information is furnished in proposals, audit data, assessment reports, preaward surveys and the like. The structured approach also provides a basis for documentation of this objective, including an explanation of any significant departure from this **objective** in reaching an agreement. The extent of documentation should be directly related to the dollar value and complexity of the proposed acquisition.

(2) The negotiation process does not require agreement on either estimated cost elements or profit elements. The profit objective is a part of an overall negotiation objective which, as a going-in objective, bears a distinct relationship to the cost objective and **any proposed** sharing arrangement. Since profit is merely one of several interrelated variables, the Government negotiator generally should not complete the profit negotiation without simultaneously agreeing on the other variables. Specific agreement on the exact weights **or values** of the individual profit factors is not required and should not be attempted.

Profit

(b) Exceptions.

(1) The profit-analysis factors set forth at FAR 15.905 shall be used for establishing profit objectives under the following listed circumstances. Generally, it is expected that this method will be supported in a manner similar to that used in the structured approach (profit factor breakdown and documentation of the profit objective); however, factors within FAR 15.905 considered inapplicable to the acquisition will be excluded from the profit objective.

(i) Contracts not expected to exceed \$100,000:

(ii) Architect-engineer contracts;

(iii) Management contracts for operation and/or maintenance of Government facilities;

(iv) Construction contracts;

(v) Contracts primarily requiring delivery of material supplies by subcontractors;

(vi) Termination settlements; and

(vii) Cost-plus-award-fee contracts (However, contracting officers may find it advantageous to perform a structured profit analysis as an aid in arriving at an appropriate fee arrangement).

(2) Other exceptions may be made in the negotiation of contracts having unusual pricing situations. Such exceptions shall be justified in writing by the contracting officer in situations where the structured approach is determined to be unsuitable.

(c) Limitation. The maximum profit objective shall be the percentage allowed pursuant to statute or regulation (see FAR 15.903(d)).

(d) Profit objective.

(1) A profit objective is that part of the estimated contract price objective or value which, in the judgment of the contracting officer, constitutes an appropriate amount of profit for

Subpart 315.70

Requests for Contract

315.7000 Scope of subpart.

This subpart prescribes the format and contents of the request for contract and provides procedures for the preparation and submission of the request for contract document.

315.7001 General.

The program office's preparation of the request for contract (RFC) and submission to the contracting activity finalizes the presolicitation phase of the acquisition planning process and commences the solicitation phase. The RFC is the formal document which initiates the preparation of the request for proposals by the contracting activity and sets the acquisition process in motion. It represents the results of planning by the project officer and contract negotiator and contains much of the pertinent information necessary for the development of a sound, comprehensive RFP.

315.7002 Procedures.

(a) Requests for contract are required to be prepared by the program office for all proposed negotiated acquisitions estimated to exceed the small purchase limitation.

(b) The program office should submit the **RFC** as early as possible to the contracting activity. The proposed period of time between the date of submission of the RFC and the date of contract award (or date of delivery of the product, service, study, etc.) should be determined by the project officer, contract negotiator, and, if necessary, the contracting officer. The amount of **leadtime** should be determined on a case-by-case basis and should reflect the characteristics and complexities of the individual acquisition. When lengthy and/or involved clearances or special approvals are required, for example, they must be taken into account when the **leadtime** is determined. If a formal acquisition planning document is used, (see Subpart 307.1), the **RFC** should be submitted in accordance with the timetable set forth in that document. **OPDIV**, agency, and regional office contracting activities may prescribe specific leadtimes for submission of **RFC's** in their implementation of this subpart.

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315.7003 Responsibilities.

It is the responsibility **of** the project officer to prepare the **RFC** so that it complies with the requirements of this subpart and any OPDIV, agency, **or** regional office guidance issued in accordance with this subpart. *Prior to the submission of the RFC* to the contracting activity, the head of **the program** office sponsoring the project shall review the **RFC** to ensure that all required information is provided in the prescribed format and a technical review of the statement of work has been **made**. The level and extent of the technical review is to be commensurate with the estimated cost, importance, and complexity of the proposed acquisition, and must be thorough enough to ensure that vague and ambiguous language is eliminated, the statement **of** work is structured by phases or tasks, if appropriate, and methods are available for assessing the contractor's technical, cost, and delivery performances.

315.7004 Transmittal.

The **RFC** will be conveyed to the contracting activity by use of a covering memorandum or other form of transmittal. The transmittal document must be signed *by* the head of the sponsoring program office and include **both** a statement attesting to the conclusiveness of the review discussed in the preceding section and a list identifying all attachments to the **RFC**. A standard format for the transmittal document may be prescribed by the OPDIV, agency, or regional office contracting activity.

315.7005 Format and content.

The Department does not prescribe a standard format for the RFC document, but recommends the use **of** a format similar to what is provided in this section. The subject areas addressed in paragraphs (a) and (b) must be included in every RFC document, whereas the areas addressed in paragraph (c) need only be included if applicable. An OPDIV, agency, or regional office contracting activity may prescribe a standard format for the **RFC** document and may include additional subject areas that are pertinent to that activity's needs. Some of the information to be furnished in the **RFC** document may be repetitive **of** that found in the acquisition planning document. If this information has not changed since the development of the acquisition planning document, the RFC document may either restate the information as it

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appears in the acquisition planning document or cross reference the applicable portion where the information appears.

(a) The RFC document must contain the following:

(1) Purpose of contract. A brief, general description of requirements, including the citation of the legislation which authorizes the program or project, is to be provided, along with a statement as to the intended purpose/use of the proposed contract.

(2) Background and need. The background history and necessity for the proposed contract are to be described. This section is to include prior, present, and planned efforts by the program office in the same or related areas, and a description of efforts by other departmental activities and Federal agencies in the same or related program areas, if known. In addition, specific project information such as the relevance or contribution to overall program objectives, reasons for the need, priority, and project overlap are to be provided.

(3) Period of performance. The number of months (or other time period) required for total performance, and, if applicable, for each phase of work indicated in the statement of work, is to be specified. The program office must indicate the proposed starting date and the required date of delivery for each deliverable.

(4) Estimated cost and fund citation. The project officer's estimate of the total cost of the proposed **contract**, and, if applicable, the estimate for each phase indicated in the statement of **work**, is to be provided. The project officer must provide a cost breakdown of all contributing cost factors, to include an estimate of the technical staff hours, direct materials, subcontracting, travel, etc. The project officer may consult with contracting and **cost** advisory personnel in developing this information. This section must include the certification of funds availability for the particular proposed acquisition, along with the appropriation and accounting information citations. When funds are not currently available but are anticipated, a statement indicating that the financial plan includes provision for the funds for the proposed acquisition **but the funds are not yet available** for obligation shall be included in lieu of the certification of funds availability. (Contracts cannot be awarded unless **funds** are available, but see FAR 32.703-2.)

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(5) Reference material. A list, by title and description, of study reports, plans, drawings, and other data to be made available to prospective offerors for use in preparation of proposals and/or the contractor for use in performance of the contract is to be provided. The project officer must indicate whether this material is currently available or when it will be available.

(6) Technical evaluation criteria and instructions. The project officer is to include the technical evaluation criteria, **which** have been developed based on the requirements of the specific project, and any instructions and information which will assist in the preparation of prospective offerors' technical proposals. For example, critical areas discussed in the statement of work and the relative order of importance and weights assigned to each of these areas for technical evaluation purposes must be identified. These areas may include understanding of the problem, technical approach, experience, personnel, facilities, etc.

(7) Sources for solicitation. The **project** officer is to develop and include a list of known potential sources by name and mailing address. The project officer is encouraged to use trade and professional journals and publications to identify new prospective sources to supplement the list of known sources. Efforts to identify set-aside possibilities, i.e., small, disadvantaged, and labor surplus areas, and women-owned businesses, must be explained.

(8) Special approvals, clearances, and requirements. All special approvals, clearances, and requirements pertinent to the proposed acquisition are to be listed in this section. Copies of the actual documents are to be attached **to** the RFC. If the approval, clearance, or requirement has **been** requested and is being processed, a footnote to this effect, including all pertinent details, must be included in this section. A list of Government-wide and Department imposed approvals, clearances, and requirements is set forth in 307.105-2. Comprehensive checklists of these and any OPDIV, agency, regional office, etc. special approvals, clearances, and requirements shall be provided for reference purposes to program offices by the servicing contracting activity.

(9) Identification and disposition of data. The project officer must identify the data expected to be generated by the acquisition and specify the data to be delivered to the

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Department (see 315.7005(b)(2)) and that to be retained by the contractor. The project officer must also include information relative to the use, maintenance, disclosure, and disposition of data. The project officer must include a statement as to whether or not another acquisition, based upon the data generated by the proposed acquisition, is anticipated. The project officer must also include a statement indicating whether the proposed acquisition is or is not subject to the Privacy Act (see FAR Subpart 24.1 and Subpart 324.1).

(10) Project officer and alternate. The project officer's name, title, organization, mailing address, and telephone number are to be provided in this section, along with the same data for the project officer's alternate. In addition, a statement that the project **officer** has completed the Department's project officer training course is to be provided (see 307.170).

(b) The following must be submitted with every RFC but are to be prepared as separate attachments so they may be readily adapted into the request for proposal format:

(1) Statement of work or specification. The statement of work describes the requirements to be performed and may describe the methods to be used (see 307.105-3 and FAR 35.005 for a detailed explanation). A specification is used in lieu of a statement of work when a clear and accurate description of the technical requirements for a product, material, or service can be provided along with the procedure to determine that the requirements have been met. It is essential that a complete and comprehensive statement of work or specification be provided by the project officer.

(2) Schedule of deliverables or reporting requirements. The project officer must specifically describe what is to be delivered and when it is to be delivered to ensure proper contract monitoring. Usually, technical and financial progress reports and the final report are prescribed in this section. These reports should be tailored to the instant acquisition and should avoid unnecessary and burdensome reporting requirements.

(c) The following may not be applicable to all **RFC's** but must be included as attachments whenever any do apply:

(1) Government property. The project officer must identify, as referenced in the statement of work, the types, individual items, and quantities of Government property to be furnished to or allowed to be acquired by, the resultant contractor, if known. The project officer must specify when the **Government** property is to be made available to the resultant contractor.

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(2) Special terms and conditions. The project **officer** may suggest inclusion of any **special** terms and conditions applicable to the proposed acquisition not already covered in the **statement** of work or the applicable contract general provisions.

(3) Justification for other than full and open competition. If the proposed acquisition is to be awarded using other than full and open **competition**, a justification, prepared in accordance with FAR Subpart 6.3 and Subpart 306.3, must be **submitted** as an attachment to the RFC.

(4) Privacy Act "system notice." **When** the project officer has **determined that the requirements of** the Privacy Act are applicable to the proposed **acquisition**, a copy of the "system notice" must be attached to the RFC (see 324.103(d)).

315.7006 Review.

Upon receipt of the RFC, the contracting activity shall review the contents to ensure that all pertinent information has been provided by the program office. If pertinent information is missing or if there are discrepancies **in** previously agreed upon information, such as significant alterations in the statement of work, the contracting activity shall obtain or clarify **the** information so that the acquisition schedule **is** met. If the program office delays furnishing the information or clarification, the acquisition schedule may have to be changed. When this circumstance arises, the contracting **activity** should notify the head of the sponsoring program office of the problem, **in** writing, of the possible slippage in the acquisition schedule, and the need for an expeditious remedy. If the head of the sponsoring program office is not responsive to the request for expediency, the matter should be referred to higher management authorities for resolution.

Subpart 315.71

Noncompetitive Acquisitions

315.7100 Scope of subpart.

This subpart sets forth policies and procedures applicable to all noncompetitive acquisitions. It describes the criteria for use in determining whether an acquisition may be made non-competitively, describes the justification documents required, and prescribes review and approval requirements.

315.7101 Policy.

(a) All negotiated acquisitions are to be conducted competitively, as required by FAR 15.105, unless there are compelling and convincing reasons and/or circumstances which justify a noncompetitive acquisition. When a proposed acquisition appears to be noncompetitive, that is, only one source has been identified, the contracting activity is responsible for ensuring that competition is definitely not feasible, and that positive actions are taken to avoid the need for subsequent or continuing **noncompetitive** acquisitions. These actions should include an analysis of the reasons and/or circumstances leading to the determination of why the noncompetitive acquisition has resulted, and what steps can be initiated to preclude noncompetitive acquisitions in the future.

(b) A noncompetitive acquisition may also result from the submission of an unsolicited proposal. In this circumstance, the responsible program office may recommend that a noncompetitive acquisition be made to the submitting organization or individual to perform work or services. This recommendation must be in writing and prepared in the "Justification for Acceptance of Unsolicited Proposal" format, as required by 315.507(d), setting forth the information stated in FAR 15.506-2 and 15.507(b). The "Justification for Acceptance of Unsolicited Proposal" is used in place of the "Justification for Noncompetitive Acquisition." Negotiations with a source that has submitted an acceptable unsolicited proposal shall not be initiated until approval is obtained in accordance with this subpart.

315.7102 Exceptions.

The provisions of this subpart apply to all negotiated **acquisitions** except:

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(a) Acquisitions of \$500 or less (see FAR 13.106(a)(1));

(b) Acquisitions of professional services: e.g., for physician, veterinarian, dentist, or legal services negotiated under the authority of 41 U.S.C. 252(c)(4), or where the foregoing kinds of services are for \$10,000 or less and are negotiated under 41 U.S.C. 252(c)(3):

(c) Acquisition of architect-engineer services (see FAR Subpart 36.6);

(d) Acquisitions of utility services where the services are available from only one source; and

(e) Acquisitions from or through other Federal Government agencies; e.g., interagency agreements, and contracts with the Small Business Administration pursuant to section 8(a) of the Small Business Act.

315.7103 Criteria.

The criteria provided below are to be used in determining whether a proposed noncompetitive acquisition is justifiable. The critical question to be answered in each justification is why the opportunity to meet an acquisition requirement cannot be made available to more than one source. It is critical to the justification of a noncompetitive acquisition that reasonable, informed opinions, which are supported by available facts, be provided. Each of the criteria is illustrative of possible reasons. The more facts that are offered and the more knowledgeable the opinions about the marketplace are, the greater is the support to conclude that a noncompetitive acquisition is justified. If the contracting officer or the approving official concludes that the support offered to justify a noncompetitive acquisition is not convincing, or where there is some unresolved doubt, a sources sought synopsis should be issued to test the marketplace. (The term "sources sought synopsis," as used in this subpart, means the type of synopsis specified in 305.205(a). When the requirement is for other than research and development, the notice in 305.205(a) should be appropriately modified to describe the specific type of service or item to be acquired. The sources sought synopsis does not permit potential sources to request solicitations and, therefore, is merely an opportunity for the marketplace to indicate its interest in submitting bids, offers,

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or quotations for a future acquisition.) If there is only one source identified as a result of the sources sought synopsis, this data may be used to support a justification for noncompetitive acquisition.

As each justification for noncompetitive acquisition is reviewed against the following criteria, the reviewer should ask: why the acquisition cannot **be** competed, are there sufficient grounds for excluding all other actual or potential offerors, what action can **be** taken to obtain competition in the instant acquisition, and what action is needed to avoid the need for a subsequent or a continuing noncompetitive acquisition?

Each applicable criterion cited **below** should be addressed in the justification, and specific rationale supporting each criterion must **be** provided.

(a) There is only one source in existence which can perform the contract requirements. The existence of one source for the purposes of this regulation should **be** a matter of fact, and not a matter dependent upon the relative and limited knowledge of **sources** known **by** the project and contracting officers. This criterion may not be used to justify a noncompetitive acquisition prior to testing the marketplace **by** issuing a sources sought synopsis. If no new sources submit responses to the sources sought synopsis, this data may be used to support a justification for noncompetitive acquisition.

(b) **One source** controls copyrights, patent rights, trade secrets, technical data, secret processes, or other proprietary data which are essential to the performance of the contract requirements; the **source** refuses to license or otherwise make the foregoing data available to other sources; and the requirement cannot **be** revised to allow other sources to compete who do not have access to the foregoing data. **Factual** information should be provided to support the use of this criterion, such as the citation of copyrights, exactly what is covered **by** the copyright or other data which is necessary to the contract performance, and why the requirement cannot **be** revised to permit competition. The mere existence of the rights does not in and of itself justify a noncompetitive acquisition. It must be shown **that** the Government cannot **meet its** requirement(s) without

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the use of the proprietary data. Any doubts should be resolved by summarizing the requirement and issuing a sources sought synopsis. If no new sources submit responses to the sources sought synopsis, this data may be used to support a justification for noncompetitive acquisition. (Note: When this criterion is to be used, the contracting officer is required to obtain legal advice from OGC-HAL.)

(c) One source or individual has a truly unique idea, approach, or equipment which has no like or equal, and this represents the only known item which can meet the Government's needs. (Unsolicited proposals are excluded from the provisions of this paragraph and shall be processed in accordance with FAR Subpart 15.5 and Subpart 315.5). Except in very rare cases, the fact that a proposer submits a proposal containing a unique idea or approach does not, in itself, justify a noncompetitive **acquisition**. Mere claims of uniqueness must not be cited in justifications to deviate from the competitive process. There may be other potential sources with equally suitable approaches or ideas which could accomplish the same end results. Except in cases which are convincingly supported by a panel opinion or a consensus of experts who are very familiar with the sources available in the marketplace, the opinion of uniqueness should be tested. The claim that the unique item is the only one which can meet the Government's needs should be based on the objective requirements of the Government, not the personal preferences of the originator. When a test of the claim of uniqueness is appropriate, the project officer should draft a description of the program requirement that does not compromise the unique idea or proprietary data of the proposer, and the contracting activity shall issue a sources sought synopsis. If no new sources submit responses to the sources sought synopsis, this data may be used to support a justification for noncompetitive acquisition.

(d) A specific item of equipment must be obtained as part of an activity's program responsibility to test and evaluate certain kinds and types of products. This criterion is limited to testing and evaluation purposes only and may not be used for initial outfitting or repetitive acquisitions. Project officers should support the use of this criterion with citations from their agency's legislation and the technical rationale for the item or equipment required.

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(e) Only one source has complex or specialized physical facilities and/or equipment which, by reason of exclusive use, access or ownership, or by reason of clear superiority to facilities and equipment available to other sources, is capable of adequately meeting the technical requirements of the proposed acquisition. It must be shown that the success of the proposed acquisition is critically dependent upon the use of the facilities and equipment of this one source. Specific details should be provided as to why the facilities and/or equipment are mandatory for the contract performance, and why the facilities and/or equipment of others cannot meet the contract requirements. This criterion should not be used to justify a noncompetitive acquisition without first defining what equipment and/or facilities are needed, and by issuing a sources sought synopsis asking for sources with comparable equipment and/or facilities. If no new sources submit responses to the sources sought synopsis, this data may be used to support a justification for noncompetitive acquisition.

(f) Government-owned facilities which are essential to the performance of the contract are available to only one source. Efforts should be made to determine from the cognizant Government agency whether the Government-owned facilities can be made available to more than one source. If this is not possible, then a noncompetitive acquisition may be justified.

(g) Full and free competition is precluded because of geographic, socio-economic, or epidemiologic considerations necessarily associated with the acquisition. This criterion is intended to recognize certain limits to achieving full and free competition which sometimes follow from certain program legislation and special program requirements. This criterion may not be used in the absence of these established limits, and may be used only when it can be shown that there is only one source which can perform the particular acquisition.

(h) The required services must be acquired from a certain State, interstate, or local government unit, or from a non-profit organization comprised of officers or representatives of these governmental units, and the organization or unit is unique in its ability to meet the contract requirements. This criterion is intended to recognize that, when dealing

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with governmental entities or their representatives, there are certain cases when only one entity is available to perform, and/or has a unique ability to accomplish, the work. This criterion should not be used to obtain supplies or services which are or can be provided from the commercial marketplace. Where there is more than one unit or organization which can meet the contract requirements, a noncompetitive acquisition cannot be justified, unless a Federal or State statute dictates the source. The fact that the governmental units or other nonprofit organizations may offer a lower price or agree to cost share is not adequate reason to justify a noncompetitive acquisition.

(i) Time is of the essence and only one known source can meet the Government's needs within the required time frame, **and/or time** will not permit the testing of a product offered by a source, other than a sole source, to meet the delivery schedule. However, the recognized extreme of public exigency in FAR 15.202 is not to be taken lightly. Public exigency, or other reasons causing situations where time is of the essence, may not be used to justify a noncompetitive acquisition without first showing that a limited competition using abbreviated procedures is impossible. If a limited competition is impossible, it must be shown that the recommended contractor possesses the unique capability to perform the required work on time to the exclusion of all other firms. The considerable latitude of the contracting officer to determine the method **best** suited to satisfy the urgent need is limited by the need to try and achieve a limited competition, if **at all** possible, and, if not, to determine that the proposed contractor is uniquely able to meet the **Government's** requirements in time.

(j) There is existing equipment which, for reasons of compatibility and interchangeability, requires **an item** which is manufactured only by one source. This criterion is for use in acquisitions where a particular brand name item is required, and an 'or equal' will not meet the Government's requirements. This criterion may not be used when there are other manufacturers available which may be able to produce acceptable items even though their products might require some adjustments and modifications. These other manufacturers must be given the opportunity to compete.

(k) The segments of the project are so intertwined that it is impossible to successfully accomplish the project objectives

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if all segments are not acquired from the same contractor (see 315.7108). This criterion is intended for use under research and development acquisition and the acquisition of studies. It is only to be used when there is a necessity to acquire the total package in order to successfully complete the project. This criterion cannot be used when segments of the project can be completed separately by different contractors. The possibility that additional work may be done more conveniently or even at less expense by the original contractor is not sufficient reason to justify a noncompetitive acquisition.

315.7104 Procedures.

(a) The program office should discuss prospective noncompetitive acquisition requests with their supporting contracting activity as early as possible during the acquisition planning stage (see FAR Subpart 7.1 and Subpart 307.11, preferably before submitting the requisition or request for contract. The discussions **may** resolve uncertainties, provide program **offices** with names of other sources, allow proper scheduling of the acquisition, and avoid delays which might otherwise **occur** should it be determined that a noncompetitive acquisition is not justified.

(b) When a program office desires to obtain certain goods or services by contract without competition, it shall, at the time of forwarding the request for contract, furnish the contracting activity a "Justification for Noncompetitive Acquisition" prepared in accordance with this subpart. **All** justifications shall be submitted initially to the contracting officer.

(c) The contracting officer who receives a justification for processing shall ascertain whether the document is complete, shall request advice from pricing, audit, legal, and other staff offices as appropriate, and shall forward the justification, including his or her concurrence or nonconcurrence, to the appropriate approving official. When the contracting officer does not concur with the justification, a written explanation setting forth the reasons **must be** provided the approving official.

If the noncompetitive acquisition is disapproved by the approving official, the contracting officer shall promptly notify the concerned program office.

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(d) All required approvals shall be obtained prior to issuing a solicitation to, or commencement of contract negotiations with, the proposed contractor. Preliminary arrangements or agreements with the proposed contractor made by someone other than the contracting officer will have no effect or influence on the rationale to support a noncompetitive acquisition.

(e) It is the responsibility of the approving official to determine whether a contract may properly be awarded without competition. The program office and project officer are responsible for furnishing the contracting officer and approving official with pertinent factual information and opinions necessary to make such determinations. Other staff offices shall advise the contracting officer and approving official as requested.

315.7105 Format for the Justification for Noncompetitive Acquisition.

(a) The format for the justification for noncompetitive acquisition in excess of \$10,000 will be a separate, **self-**contained document. Justifications for noncompetitive acquisitions of \$10,000 or less may be in the form of a paragraph or paragraphs contained in the requisition or request for contract.

(b) Justifications for noncompetitive acquisition, whether over or under \$10,000, shall fully express what is to be acquired and the reasons why the requirement should not be competed. **Justifications** must offer reasons which go beyond inconvenience and must explain why it is impossible to obtain competition. The justification will be documented only with information that is based on facts rather than untested and unsubstantiated conclusions or opinions. Documentation in the justification should be sufficient to permit an individual with technical competence in the area to follow the rationale.

(c) Justifications for noncompetitive **acquisitions** in excess of \$10,000 will be presented in two parts.

(1) Part I will contain background information about the program and a description of the acquisition. The following information should be included:

(i) Date.

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(ii) Agency, program **office**, and project officer (name, address, and telephone number).

(iii) Project identification (Program legislation including citations or other internal program identification data such as **title**, contract number, etc.)

(iv) Descriptive title of the project. (Attach a full description of the contract requirement. This may be a specification, purchase description, or statement of work. If the acquisition, as contemplated at the outset, is a "whole project buy" (see 315.7108) and is expected to exceed \$100,000, an acquisition plan, as required by Subpart 307.1, shall be prepared by the project officer and attached to the justification. The description of the whole project buy must include what is being acquired, the estimated cost of the whole and component parts, phases, options, continuations, etc., and the periods of time involved. The description is critical to the approving official's understanding of what he/she is being asked to approve, and for subsequent use by the contracting or project offices.)

(v) Explain whether the acquisition is an entity in itself, whether it is one in a series, or part of a related group of acquisitions.

(vi) Proposed contractor (name and address).

(2) Part II will include the facts and reasons to justify a noncompetitive acquisition.

(i) Part II will begin with the following statement:

I recommend that this acquisition be non-competitively negotiated with _____ in the amount

(Name of proposed contractor)
of _____ for the following reasons:

(Amount)

(ii) Immediately following the preceding statement, each of the applicable criteria listed in 315.7103 must be addressed, and specific support for each criterion's use must be included.

(iii) At the end of Part II, signatory lines should be provided as follows:

Approved _____ Date _____
 Approving Official

Justifications for noncompetitive acquisitions shall be processed for review and approval as follows:

(b) For acquisitions over \$10,000, but **not** over \$99,999, the justification shall be submitted to the contracting officer for review. The contracting officer will either concur or nonconcur, and forward the justification to the principal official responsible for acquisition for approval. (When the contracting officer and principal official responsible for acquisition tire the same individual, the approval will **be** made by the Noncompetitive Review Board or by the principal OPDIV **or** regional official responsible for administration (see (c), below)). The principal official responsible for acquisition may redelegate justification approval for acquisitions between \$10,000 and \$25,000 to the chief of the contracting office, provided that individual is at least one level above the contracting officer who will sign the contract.

(c) All justifications for noncompetitive acquisitions \$100,000 or over shall be submitted through the contracting

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officer to the Noncompetitive Review Board (see 315.7107) for approval, unless the OPDIV head or regional director has determined that the activity will not use a Noncompetitive Review Board. If the Board is not used, the justifications for \$100,000 and over shall be submitted through the contracting officer for approval by the principal OPDIV or regional official responsible for administration.

(d) Each OPDIV or regional office may prescribe Board reviews for noncompetitive acquisitions under \$100,000 if reduced levels of review would be more consistent with the dollar ranges of contracts awarded.

315.7107 Noncompetitive Review Board.

(a) The Noncompetitive Review Board, referred to as the "Board", is responsible for comparing the reasons given in justifications for noncompetitive acquisitions against the criteria cited in 315.7103 and for making judgments as to the applicability of the policy requirements for competition to specific acquisitions. If it is determined by the OPDIV head or regional director to use a Board, the Board shall be established and maintained in compliance with this section.

(b) Boards shall be established by the OPDIV head or regional director and be directly responsible to that individual. The OPDIV heads are responsible for establishing Boards as needed in their OPDIVs and respective elements. The Assistant Secretary for Management and Budget is responsible for establishing a Board in the Office of the Secretary. The regional directors are responsible for establishing Boards in their regional offices. The number and geographical location of Boards will be decided by the OPDIV heads based upon the volume of noncompetitive acquisitions to be reviewed and the need for timely decisions, provided that the composition of the Boards meet the requirements of the following paragraph.

(c) The OPDIV head or regional director, as appropriate, shall appoint the Board members. The Board shall be established and delegated the authority by the appointing official to represent and make decisions on behalf of the appointing official with respect to approving or disapproving certain justifications for noncompetitive acquisitions. The Board shall be comprised of five members, or their alternates, as specified below:

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(1) Chairperson. There will be a permanent chairperson on the Board who shall be the principal official responsible for administration. The chairperson should represent the appointing official and be able to review actions submitted to the Board from an activity-wide point of view. The chairperson will designate which of the alternate members will attend individual Board meetings and will assure that the proceedings of each meeting are recorded.

(2) Acquisition official. There will be a key acquisition official appointed to the Board. This official will be the principal official responsible for acquisition. Where the activity has more than one contracting office, the principal officials responsible for acquisition of the respective contracting offices will be designated alternate members. In this case, a principal official responsible for acquisition will serve on the Board to review proposed noncompetitive **acquisitions** expected to be assigned to his/her office for acquisition action. Whenever the principal official responsible for acquisition and the contracting officer are the same individual, the official one administrative level above the principal official responsible for acquisition shall represent the contracting office in the Board actions.

(3) Program officials. Two representatives will be selected from officials at the activity level which have responsibility for program policy or-operations, program planning and evaluation, scientific affairs, research, etc., and/or from the program divisions of the activity that sponsor contract projects. The members should be selected on the basis of their knowledge of a program as a whole, but should not ordinarily be involved in the initiation and management of particular or single projects.

(4) Contracting officer. The contracting officer responsible for the acquisition to which the justification for non-competitive acquisition relates shall serve as a nonvoting member. When Board meetings consider justifications for acquisition involving more than one contracting officer, each contracting officer may attend and offer opinions on the justification pertinent to him/her.

As a further note, the project officer, that individual in the program office who originated the justification and who will be responsible for the project management of the contract

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project, cannot be a member or alternate on the Board. However, the project officer may **be** invited by the chairperson to the Board meeting during which the justification will **be** discussed. The project officer should be prepared to answer questions raised by the Board.

(d) Meetings of the Board shall be conducted as follows:

(1) If the estimated amount of the acquisition is more than \$500,000, a formal meeting of the Board is required. If the estimated amount of the acquisition is \$500,000 or less, a formal meeting of the Board need not **be** held if the chairperson, acquisition official, **and contracting** officer concur that a noncompetitive acquisition is justified. If **any one of** these three persons is of the opinion that a noncompetitive acquisition is not justified, **a** formal meeting must **be** held. Formal meetings will include all appropriate **members** and will be convened **by** the chairperson. No action shall **be** considered **by** the Board unless the chairperson, acquisition official, and two program officials **are** present. Decisions of the Board **will be by** majority rule. In case of a tie vote, the action will **be** resolved in **favor** of seeking competition.

(2) The chairperson may seek independent counsel from any **source** inside or outside of the activity if he/she feels that additional advice is necessary for the Board to reach a sound decision.

(3) The Board shall maintain a written record of the justifications reviewed and the decision made on each. If a **justification** is approved, only Board approval need **be** indicated. If a justification is disapproved, the reasons should **be** stated in writing and forwarded to the originator of the justification. The written decision of the Board should be made a part of the contract file.

315.7108 Whole project **buys**.

(a) "Whole project **buy**" is a term used to describe an acquisition concept whereby **a** project consists of distinctly identifiable segments or phases which are so interdependent that they must **be** viewed **as** a total package and must be acquired from a single contractor to ensure consistency and to **meet** the overall project objectives. This concept is only to **be** used when it is necessary to acquire the whole project or

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total package from a single contractor in order to complete the project successfully; that is, the identifiable segments or phases cannot be separated and acquired individually from other than the single contractor without jeopardizing the successful completion of the project.

The whole project **buy** concept serves as an excellent management tool, in that it provides the Board or approving official with detailed and interrelated aspects of the proposed acquisition action of a complex project. It also serves to motivate program and contracting personnel to focus their attention on the **various** aspects of the project and to plan and prepare an **indepth** analysis encompassing the total project and its component parts. This should result in the development of an acquisition plan which identifies all pertinent information concerning the segments or phases of a project, while providing a comprehensive overview of the total project.

(b) Any whole project **buy** which exceeds \$100,000 in the aggregate and which contemplates any noncompetitive acquisition actions of any dollar value at **any time** during the project life shall **be** submitted to the Board or approving official for approval. This requirement applies even if the first of a series of related acquisitions in a whole project **buy** is less than \$100,000. It applies to projects with several related acquisition actions where the first part of the project is either competitively or noncompetitively awarded, and there are to **be** subsequent noncompetitive acquisitions with the original contractor. This requirement applies to all acquisitions regardless of whether the noncompetitive acquisition is called a renewal, follow-on, continuation, extension, etc., is to **be** effected by means of a contract modification, or is a new start.

(c) Justifications of whole project buys submitted to the Board or approving **official** shall fully describe what the complete requirement **is**, how the requirement will be divided into acquisition actions, the total estimated cost of the whole project and each individual acquisition action, the total period of **time** for the whole project and each acquisition action, and whether all or what parts of the whole project will **be** acquired noncompetitively. For projects where an end point cannot be forecast with certainty, as in the case of basic research, the whole project buy will be the circumscribed amount of time which the program office presently intends to

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continue the effort.

(d) If the Board or approving official clearly approves the noncompetitive acquisition action(s) at the outset of a whole project buy, and the whole project buy results in an original contract followed by either a noncompetitive new contract, or noncompetitive modification to the original contract for work, dollars, and time approved by the Board or approving official, these subsequent noncompetitive acquisition actions will not have to be resubmitted for approval. However, whole project buys may not be approved in excess of three (3) years, and approval is limited to that explicitly contained in the justification. If a part of the whole project buy is not included in the justification or there are changes in the project which would amend the whole project buy as approved, the excluded part and/or changes will require a separate review and approval. If there are questions as to what was approved, the questionable material shall be submitted to the Board or approving official for clarification.

(e) Once a whole project buy has been approved at an appropriate level, any RFP issued for the acquisition shall contain a notification to all potential offerors that the RFP is for the first phase of a whole project buy, the balance of which is projected to be awarded noncompetitively to the successful offeror. It shall also contain as complete a description as possible of the project so that potential offerors may gain an understanding of the full scope of the project. Finally, the notification shall also state that the Government reserves the right to conduct competitive acquisitions for the subsequent phases if this becomes possible.

Part 316

Types of Contracts

Subpart **316.3-** Cost-Reimbursement Contracts

Section

316.301 General.
316.301-3 Limitations.
316.303 Cost-sharing contracts.
316.306 Cost-plus-fixed-fee contracts.
316.307 Contract clauses.

Subpart **316.4-** Incentive Contracts

316.403 Fixed-price incentive contracts.

Subpart **316.6-** Time-and-Materials, Labor-Hour,
and Letter Contracts

316.601 Time-and-materials contracts.
316.603 Letter contracts.
316.603-2 Application.
316.603-3 Limitations.
316.603-70 Information to be furnished when requesting
authority to issue a letter contract.
316.603-71 Approval for modifications to letter contracts.

Subpart **316.7-** Agreements

316.702 Basic agreements.
316.770 Unauthorized types of agreements.
316.770-1 Letters of intent.
316.770-2 Memorandums of understanding.

Subpart 316.3

Cost-Reimbursement Contracts

316.301 General.

316.301-3 Limitations.

(a) and (b) Reserved.

(c) The following format shall be used and executed by the contracting officer as the determination and findings authorizing the use of a cost-reimbursement contract and establishing the fee:

DEPARTMENT OF **HEALTH** AND HUMAN SERVICES
DETERMINATION AND FINDINGS

Authority to Use Cost-Reimbursement Contract

I hereby find that:

(1) The (agency title) proposes to contract with (name of proposed contractor) for (describe work, service, **or** product) (identify program or project). The estimated cost is (\$_____) (if contract is CPFF type, insert, "plus a fixed fee of (\$_____), which is ____ percent of the estimated cost exclusive of fee").

(2) (Set forth facts and circumstances that show why it is impracticable to secure property or services of the kind or quantity required without the use of the proposed type of contract, or why the proposed method of contracting is likely to be less costly than other methods.)

I hereby determine that:

On the basis of the above findings, and in accordance with FAR 16.301-3, it is impracticable to secure the property or services of the kind or quality required without the use of a (cost, cost-sharing, or cost-plus-fixed fee*) type of contract, or the (cost, cost-sharing, or cost-plus-fixed fee*) method of contracting is likely to be less costly

*Use applicable word, words, or statement.

Cost-Reimbursement Contracts

than other methods.

Date _____

(Signature)

316.303 Cost-sharing contracts.

For detailed information concerning the use of cost-sharing contracts, see 335.070.

316.306 Cost-plus-fixed-fee contracts.

(a) - (c) (1) **Reserved.**

(c)(2) The **determination** and findings (D&F) required by FAR 16.306(c)(2) has been combined with the **D&F** required by FAR 16.301-3(c) authorizing the use of a cost-reimbursement contract, and is shown in 316.301-3(c). The contracting officer is responsible for executing the D&F and is authorized to make both the determinations required by the FAR.

316.307 Contract clauses.

(a) If the contract is with a hospital (profit or nonprofit), modify the "Allowable Cost and Payment" clause at FAR 52.216-7 by deleting from paragraph (a) the words "**Subpart** 31.2 of the Federal Acquisition Regulation (FAR)" and substituting "**45 CFR** Part 34 Appendix **E**."

(b) - (i) **Reserved.**

(j) The contracting officer shall insert the clause at 352.216-72, Additional Cost Principles, in solicitations and resultant cost-reimbursement contracts with nonprofit organizations, as identified in **OMB** Circular A-122.

Subpart 316.4

Incentive Contracts

316.403 Fixed-price incentive contracts.

(a) and (b) Reserved.

(c) The determination and findings required by FAR 16.403(c) shall be executed by the chief of the contracting office after it is prepared by the contracting officer.

Subpart 316.6

Time-and-Materials, Labor-Hour,
and Letter Contracts

316.601 Time-and-materials contracts.

(a) and (b) Reserved.

(c) Limitations. • The format prescribed in **316.301-3(c)** shall be used and executed by the contracting officer as the determination and findings authorizing the use of either a time-and-materials contract or a labor-hour contract, except that the final paragraph shall be changed to read as follows:

I hereby determine that:

On the basis of the above findings, no other type of contract will suitably serve for the acquisition of the required work or services.

316.603 Letter contracts.

316.603-2 Application.

It is the policy of the Department to refrain from issuing letter contracts. Exceptions to this policy will be permitted only in those cases where all matters of a substantive nature, such as statements of work, delivery schedules, and general and special clauses, have been resolved and agreed upon.

316.603-3 Limitations.

The principal official responsible for acquisition shall be the approving official who executes the prescribed written statement. However, if the principal official responsible for acquisition is to sign the letter contract as the contracting officer, the approving official becomes the head of the contracting activity.

316.603-70 Information to be furnished when requesting authority to issue a letter contract.

The following information should be included by the contracting officer in any memorandum requesting approval to issue a letter

Time-and-Materials, Labor-Hour,
and Letter Contracts

contract:

- (a) Name and address of proposed contractor.
- (b) Location where contract is to be performed,
- (c) Contract number, including modification number, if possible.
- (d) Brief description of work and services to be performed.
- (e) Performance or delivery schedule.
- (f) Amount of letter contract.
- (g) Estimated total amount of definitized contract.
- (h) Type of definitive contract to be executed (fixed price, **cost-**reimbursement, etc.)
- (i) Statement of the necessity and advantage **to** the Government of the use of the proposed letter contract.
- (j) Statement of percentage of the estimated cost that the obligation of funds represents. In rare instances where the obligation represents 50 percent or more of the proposed estimated cost of the acquisition, a justification for that obligation must be included which would indicate the basis and necessity for the obligation (e.g., the contractor requires a large initial outlay of funds for major subcontract awards or an extensive purchase of materials to meet an urgent delivery **requirement**). In every case, documentation must assure that the amount to be obligated is not in excess of an amount reasonably required to perform the work.

(k) Period of effectiveness of the proposed letter contract. If more than 180 days, complete justification must be given.

(l) Statement of any substantive matters that need to be resolved.

316.603-71 Approval for modifications to letter contracts.

All letter contract modifications (amendments) must be **ap-**

Time-and-Materials, Labor-Hour,
and Letter Contracts

proved by the principal official responsible for acquisition. Requests for authority to issue letter contract modifications shall be processed in the same manner as requests for authority to issue letter contracts and shall include the following:

- (a) Name and address of the contractor.
- (b) Description of work and services.
- (c) Date original request was approved and indicate approving official.
- (d) Letter contract number and date issued.
- (e) Complete justification as to why the letter contract cannot be definitized at this time.
- (f) Complete justification as to why the level of funding must be increased.
- (g) Complete justification as to why the period of effectiveness is increased beyond 180 days, if applicable.
- (h) If the funding of the letter contract is to be increased to more than 50 percent of the estimated cost of the acquisition, the information required by **316.603-70(j)** must be included.

subpart 316.7

Agreements

316.702 Basic agreements.

(a) Reserved.

(b) **Application.**

(1) Reserved.

(2) Basic agreements shall continue in effect until termination, supersession, or expiration of the term.

(c) Reserved.

(d) Contracts incorporate basic agreements.

(1) Reserved.

(2) Any provision of a contract which conflicts with the terms of a basic agreement must be approved by the Director, Division of Acquisition Policy, OAGM.

(3) Reserved.

(4) Basic agreements may include negotiated overhead rates for cost-reimbursement type contracts. Where negotiated overhead rates are included, the bases to which the rates apply and the period of applicability must also be stated. All pertinent provisions such as final rates for past periods, provisional **rates** for current or future **periods**, ceilings, and **any** specific items to **be** treated as indirect costs shall also be included **as** appropriate.

(e) Content and format. A basic agreement shall consist of an execution page(s), **contents page, special provisions, and** general provisions. The following is illustrative of an execution page:

Agreements

Basic Agreement
Number:

Page 1 of p a g e s

BASIC AGREEMENT

BETWEEN THE UNITED STATES OF AMERICA, AS REPRESENTED BY THE DEPARTMENT OF HEALTH AND HUMAN SERVICES, and (Name of Contractor), THIS AGREEMENT, effective (Insert Date) by and between the UNITED STATES OF AMERICA, hereinafter called the "Government," as represented by the DEPARTMENT OF HEALTH AND HUMAN SERVICES, and (Name of Contractor), a corporation organized and existing under the laws of the (State/Commonwealth) of _____ with its principal office in (City, State), hereinafter called the "Contractor".

WITNESSETH THAT

WHEREAS, the Government and the Contractor desire to enter into a single basic agreement for use only in connection with negotiated (insert type of contract and categories of effort that the basic agreement will cover) entered into on or after the effective date of this Agreement, and prior to its termination; and

WHEREAS, the parties understand that this Agreement shall not in any manner provide for or imply any agreement on the part of the Government to place future orders or contracts with the Contractor.

NOW THEREFORE, the Government and the Contractor agree that the provisions and clauses of the Special Provisions, as set forth herein, and the General Clauses, as set forth and modified herein, shall be incorporated in and constitute the terms and conditions applicable to all negotiated (insert type of contract and categories of effort that the basic agreement will cover) entered into on or after the effective date of this Agreement, and prior to its termination.

Agreements

IN WITNESS **WHEREOF**, the parties hereto have executed this Agreement as of the day and year first above written.

UNITED STATES OF AMERICA

Name of Contractor

Signature of
Contracting Officer

By _____
Signature of Authorized
Official

Typed Name

Typed Name

Date

(f) Pr cedures. (1) Negotiation of basic agreements may be undertake: by **OPDIV** contracting activities on behalf of the Department. When an OPDIV contracting activity decides to negotiate a basic agreement with an organization, prior authorization must be requested, in writing, from the Director, Division of Acquisition Policy (DAP). When the Director, DAP gives written authorization to the OPDIV contracting activity designated to conduct negotiations on behalf of the Department, all other OPDIVs will be notified of this designation. If another OPDIV elects, it may attend the negotiation or furnish special terms and conditions or provisions for inclusion in the proposed basic agreement by advising the designated negotiating activity in writing within ten (10) days from the date of the authorization. After review and resolution of all requests for inclusion of special terms and conditions or provisions, the designated negotiating activity will invite those OPDIVs which expressed an interest in attending the negotiations and make the necessary arrangements for the negotiation of the basic agreement.

Agreements

(2) Prior to the conclusion of negotiations, the designated negotiating activity shall furnish the OPDIVs a draft copy of the **proposed** basic agreement together with:

(i) A resume of all salient features of the basic agreement which will facilitate review:

(ii) Any of the negotiating **OPDIV's** guides or procedures which are being considered for incorporation into the basic agreement by reference;

(iii) A listing of nonstandard clauses **used**, the genesis of such clauses, and the reasons for such clauses in the **basic** agreement; and

(iv) The contractor's comments, including the basis **for** requesting any deviation from the **HHSAR**, and the designated negotiating activity's position with respect thereto.

(3) The OPDIVs shall have fifteen (15) days from the date of the memorandum transmitting the information to submit comments on the draft copy of the basic agreement. After receipt, analysis, and resolution of the comments of the OPDIVs, the designated negotiating activity will proceed to conclude the negotiation of the basic agreement.

(4) After conclusion of the negotiation, but prior to execution of the basic agreement, a copy of the basic agreement, together with the information specified in paragraph (f)(2) above, the comments of the OPDIVs, the designated negotiating activity's analysis of the **OPDIV** comments, and the basis for the action taken will be furnished to the Director, Division of Acquisition Policy for review by DAP and the Office of General Counsel. Approval by the Director, DAP must be given prior to the execution of the basic agreement. After approval and execution of the basic agreement, the **designated negotiating** activity will distribute the executed **document to the OPDIVs**, Office of General Counsel, and the Director, DAP. The basic agreement is mandatory for use by all activities of the Department for all acquisitions falling within the scope of the basic agreement.

316.770 Unauthorized types of agreements.

Agreements

316.770-1 Letters of intent.

A letter of intent is an informal unauthorized agreement between the Government and a prospective contractor which indicates that products or services will be produced after completion of funding and/or other contractual formalities.

Letters of intent are often solicited by prospective contractors or may be originated by Government personnel. Letters of intent are not authorized by the FAR and are prohibited for use by Department personnel.

316.770-2 Memorandums of understanding.

A "memorandum of understanding" is **an** unauthorized agreement, usually drafted during the course of negotiations, to modify mandatory FAR **and** HHSAR provisions in such a manner as to make them more acceptable to a prospective contractor. It may be used to bind the contracting officer in attempting to exercise rights given the Government under the contract, **or** may contain other matters directly contrary to the language of the solicitation or **prospective** contractual document.

Use of **such** memorandums of understanding is not authorized. Any change in a solicitation or contract shall be made by amendment or modification to that document. When a change to a prescribed contract clause is considered **necessary, a** deviation shall be requested.

Part 317

Special Contracting Methods

Subpart 317.2 - Options

Section

317.201 Definition.
317.202 Use of options.
317.203 Solicitations.
317.206 Evaluation.

Subpart 317.70 - Consolidated Acquisitions

317.7001 General.
317.7002 Policy.

Subpart 317.71 - Supply and Service Acquisitions
Under the Government Employees
Training Act

317.7100 Scope of subpart.
317.7101 Applicable regulations.
317.7102 Acquisition of training.

1

2

3

Subpart 317.2

Options

317.201 Definition.

(a) An option must:

- (1) Identify the supplies or services as a discrete option quantity in addition to the basic quantity of supplies or services to be delivered under the initial contract award;
- (2) Establish a price or specify a method of calculation which will make the price certain;
- (3) Be agreed to and included in the initial contract award:
and
- (4) Permit the Government the right to exercise the option unilaterally.

(b) Contract provisions which provide the Government the right to buy additional requirements, subject to the written agreement of the contractor, do not meet the requirements of paragraph (a) (4) of this section and are not authorized. Further, any contract provision which merely extends the initial contract period without requiring delivery of additional supplies or services is not an option.

317.202 Use of options.

(a) and (b) Reserved.

(c) (1) - (5) Reserved.

(6) The primary purpose for inclusion would be the achievement of administrative convenience.

317.203 Solicitations.

(a) - (f) Reserved.

(g) (1) Reserved.

(2) When unusual circumstances exist, the principal official responsible for acquisition (not delegable) may approve a greater

Options

percentage (but see FAR 17.205).

317.206 Evaluation.

! The determination referenced in FAR 17-206(b) shall be made by the chief of the contracting office.

Subpart 317.70

Consolidated Acquisitions

317.7001 General.

Studies have indicated that substantial savings can be realized through the centralized and consolidated acquisitions of common use supplies, services, and equipment. The Department has identified common use items and has applied the principle of consolidated acquisition to these items.

317.7002 Policy.

(a) The following supplies, services, and equipment have been identified as common use items and are to be acquired by the centralized contracting office identified in paragraph (b):

(1) Administrative supplies, equipment, and services (i.e., general use office items or related services), as distinguished from functional or program requirements.

(2) Automated data processing services (but see IRM Manual, Chapter 4).

(3) Stenographic reporting services.

(4) Visual arts, graphics, and supplementing services.

(5) Press clipping services.

(b) Activities within the metropolitan Washington, D.C. area are required to submit purchase requests for the above items to the applicable centralized contracting office as follows:

- | | |
|--|--|
| (1) Activities located in the Southwest Washington Complex | Division of Contract Operations, Office of Acquisition and Grants Management, Office of the Secretary |
| (2) Parklawn Complex
Rockville, Maryland
(Montgomery and Prince George's Counties) | Division of Acquisitions Management, Administrative Services Center, Office of Management, Public Health Service |

Consolidated Acquisitions

(3) National Institutes
of Health

Division of Procurement,
National Institutes of
Health

(C) Activities outside the metropolitan Washington, D.C. area are encouraged to establish centralized points to conduct acquisitions for common use items.

Subpart 317.71

Supply and Service Acquisitions
Under the Government Employees Training Act

317.7100 Scope of subpart.

This subpart provides alternate methods for obtaining training in non-Government facilities under the Government Employees Training Act, 5 U.S.C. Chapter 41.

317.7101 Applicable regulations.

Basic policy, standards, and delegations of authority to approve training are contained in HHS Personnel Manual Instruction 410-1.

317.7102 Acquisition of training.

(a) The acquisition of interagency training courses and non-governmental off-the-shelf training courses, whether for individual employees or for groups of employees, is the responsibility of the Assistant Secretary for Personnel Administration.

(b) Non-governmental training must be acquired through the contracting office if there are costs for training course development or for modification of off-the-shelf training courses.

Part 319

Small Business and Small Disadvantaged
Business Concerns

Subpart 319.2 - Policies

Section

319.201 General policy.
319.201-70 Small and disadvantaged business utilization
specialist.
319.270 Federal acquisition conferences.

Subpart 319.5 - Set-Asides for Small Business

319.501 General.
319.503 Setting aside a class of acquisitions.
319.503-70 Small business class set-aside for construction,
repair, and alteration work.
319.505 Rejecting set-aside recommendations.
319.506 Withdrawing or modifying set-asides.
319.570 Contract payments.

Subpart 319.7 - Subcontracting with Small Business
and Small Disadvantaged Business
Concerns

319.705 Responsibilities of the contracting officer under
the subcontracting assistance program.
319.705-2 Determining the need for a subcontracting plan.
319.705-3 Preparing the solicitation.
319.705-4 Reviewing the subcontracting plan.
319.705-5 Awards involving subcontracting plans.
319.705-6 Postaward responsibilities of the contracting
officer.
319.706 Responsibilities of the cognizant administrative
contracting officer.

Subpart 319.8 - Contracting with the Small Business
Administration (The 8(a) Program)

319.800 General.
319.803 Selecting acquisitions for the 8(a) Program.
319.812 Contract administration.
319.870 Liaison with the Small Business Administration.

Subpart 319.2

Policies

319.201 General policy.

(a) and (b) Reserved.

(c) The functional management responsibilities for the Department's small business, disadvantaged business, and labor surplus area programs are delegatea to the Director of the Office of Small and Disadvantaged Business Utilization (OSDBU).

(1) The Director, OSDBU is responsible for:

(i) Recommending to the Under Secretary overall **Department-**wide operating concepts and policies relating to the Department's small business, disadvantaged business, and labor surplus area programs;

(ii) Implementing policy decisions through the issuance of operating procedures (Operating Divisions (**OPDIVs**) may develop alternative procedures for achieving departmental policy, goals, and objectives. However, any change in procedures must be approved by the Under Secretary);

(iii) Reviewing and evaluating the Department's policies, practices, and procedures pertaining to the disadvantaged business, small business, and labor surplus area programs, as well as recommending changes or corrective actions to the OPDIV heads or to the Under Secretary, as appropriate;

(iv) Providing the Under Secretary with regular appraisals of performance and quality of effort, including timely notification of significant problems, events, and accomplishments, and the need for changes in Department-wide objectives and policies: and

(v) Providing technical assistance and support to the small and disadvantaged business utilization specialists.

(2) The **Director**, OSDBU is authorized to:

(i) Establish standards, **procedures** and operating guidelines controlling the manner in which the small business, disadvantaged business, and labor surplus area programs are conducted throughout the Department:

Policies

(ii) Provide advice **on** proposed allocations **of** personnel, funds, and other resources in light of the total needs **of** the Department:

(iii) Prescribe, after coordination with appropriate concerned personnel, reporting requirements necessary to **preserve** openness in reporting, identify emerging problems, monitor Department-wide activity, **and** provide a basis for appraisal and evaluation of performance. To the maximum extent, these reporting requirements will be satisfied through existing Department-wide reporting systems **or** by making modifications to them ;

(iv) Conduct surveys and review of operating practices in the **OPDIVs** and regional offices: and

(v) Communicate directly with the small and disadvantaged business utilization specialists to assist them in carrying out their individual and collective responsibilities.

319.201-70 Small and disadvantaged business utilization specialist.

(a) The Head of each OPDIV shall appoint a qualified **full-time** small and disadvantaged business utilization specialist (**SADBUS**) in the following activities: Office of Human Development Services (OHDS), **Health Care Financing** Administration (**HCFA**), Social Security Administration (SSA), Public Health Service (PHS), to include the Food and Drug Administration (**FDA**), Health Resources and Services Administration (HRSA) (**and each** regional Office of Engineering Services), Indian Health Service (IHS), National Institutes of Health (NIH), Alcohol, **Drug Abuse,** **and** Mental Health Administration (ADAMHA), Centers for Disease Control (CDC), and Administrative Services Center (**ASC**). A **SADBUS** shall also be appointed for the Office of the Secretary (OS) and for each Regional Office. As deemed necessary, additional small and disadvantaged business utilization specialists may be appointed in larger contracting activities.

(b) When the volume of contracting does not warrant assignment of a full-time **SADBUS**, an individual shall be appointed as the specialist on a part-time basis. The responsibilities of this assignment shall take precedence over other responsibilities. The specialist shall be responsible directly to the appointing authority and shall **be at an** organizational level outside the direct acquisition chain of command, i.e., should report directly to the principal official responsible for acquisition, where appropriate.

Policies

(c) The Director, OSDBU will exercise functional management authority over small and disadvantaged business utilization specialists regarding small business, disadvantaged business, and labor surplus area matters. Appointments of SADBUS's shall only be made after consultation with the Director, OSDBU. A copy of each appointment and termination of appointment of specialists shall be forwarded to the Director, OSDBU.

(d) The SADBUS shall perform the following duties, as determined to be appropriate to the activity by the appointing official or by the Director, OSDBU. The SADBUS shall:

(1) Maintain a program designed to locate capable small business, disadvantaged business, women-owned business, and labor surplus area business sources for current and future acquisitions, through SBA or by using other methods, establish appropriate source lists for each category, and work closely with contracting and small purchasing offices to ensure offers are solicited from firms on the source lists;

(2) Coordinate inquiries and requests for advice from small business, disadvantaged business, women-owned business, and labor surplus area business concerns on acquisition matters, and counsel them with respect to business opportunities to enhance their potential participation in the Department's acquisition program:

(3) Prior to the issuance of solicitations (or contract modifications for additional supplies or services) in excess of the small purchase limitation, which have not been reviewed, reserved, or set-aside by the contracting officer, review the contracting officer's justification for such action:

(4) Assure that small business, disadvantaged business, women-owned business, and labor surplus area concerns are provided adequate specifications or drawings by initiating actions, in writing, with appropriate technical and contracting personnel to ensure that all necessary specifications or drawings for current and future acquisitions, as appropriate, are available;

(5) Review proposed requirements for possible breakout of items suitable for acquisitions from small business, disadvantaged business, women-owned business, and labor surplus area concerns;

Policies

(6) Assure that financial assistance, available under existing regulations, is offered, and that requests by small business concerns for proper assistance are not treated as a handicap in the award of contracts;

(7) Participate in determinations concerning responsibility of prospective contractors whenever small business concerns are involved;

(8) Participate in the evaluation of a prime contractor's small business, labor surplus area, and disadvantaged business subcontracting plans:

(9) Advise and assist contracting officers in discharging their responsibilities by:

(i) Monitoring and reviewing contractor performance to determine compliance with small and small disadvantaged business subcontracting plans, and

(ii) Developing and maintaining records and reports that reflect such compliance or noncompliance:

(10) Review and make appropriate recommendations to the contracting officer on proposals to furnish Government-owned facilities to contractors if this action may enhance the small business program;

(11) Assure that the participation of small businesses, disadvantaged businesses, women-owned businesses, and labor surplus area concerns is accurately reported:

(12) Make available to SBA copies of solicitations when so requested;

(13) When a bid or offer from a small business, disadvantaged business, women-owned business, or labor surplus area concern has been rejected for nonresponsiveness or nonresponsibility, upon request, aid, counsel and assist that firm in understanding requirements for responsiveness and responsibility so that the firm may be able to qualify for future awards:

Policies

(14) Participate in government-industry conferences to assist small business, disadvantaged business, women-owned business, and labor surplus area concerns, including Business Opportunity/Federal Acquisition Conferences, Minority Business Enterprises Acquisition Seminars, and Business Opportunity **Committee** meetings;

(15) Advise potential sources how they can obtain information about sealed bid and negotiated acquisitions;

(16) Brief the head of the contracting activity at least once quarterly concerning the status of the activity's small business, disadvantaged business, women-owned business and labor surplus area programs in relation to goals and objectives established;

(17) Participate in the development, **implementation**, and review of automated source systems to assure that the interests of small business, disadvantaged business, women-owned business, and labor surplus area concerns are fully considered;

(18) Assure that the organization maintains a list of products and services which are categorized as repetitive small business set-asides;

(19) Provide small business, disadvantaged business, women-owned business, and labor surplus area concerns information regarding assistance available from Federal agencies such as the Small Business Administration, Minority Business Development Agency, Bureau of Indian Affairs, Economic Development Administration, National Science Foundation, Department of Labor, and others, including State agencies and trade associations;

(20) Be responsible for establishing an education and training program for personnel whose duties and functions affect the activity's small business, disadvantaged business, women-owned business, and labor surplus areas programs; and

(21) Participate in interagency programs relating to small business, disadvantaged business, women-owned business, and labor surplus area matters as authorized by the Director, OSDBU.

Policies

319.270 Federal acquisition conferences.

The Department of Commerce is responsible for coordinating the participation of Federal civilian agencies in a continuing series of conferences which are sponsored by members of Congress. The objectives of these conferences are:

- (a) Location of additional acquisition sources to broaden the acquisition base of Federal agencies;
- (b) Stimulation of local, regional, and national economic growth, national security, and cost reduction;
- (c) Location of underutilized production capacity;
- (d) Prevention or elimination of pockets of underemployment; and
- (e) **Assistance** of small and small disadvantaged business concerns.

As notified by the OSDDBU, contracting activities shall provide appropriate **SADBUS** or acquisition personnel to participate in **person-to-person** counseling at these conferences. Ordinarily, participation by contracting activities will be restricted to conferences held within the geographical areas adjacent to their offices.

The brochure, "How To Do Business With **DHHS**" should be of great assistance in this counseling as it has been specifically prepared to assist individuals, firms, and institutions who may wish to do business with this Department. It contains a brief **descripton** of the mission and programs of HHS and its Operating Divisions and provides a listing of contracting offices and the types of services and **commodities** acquired by each.

Subpart 319.5

Set-Asides for Small Business

319.501 General.

(a) and (b) Reserved.

(c) Prior to the contracting officer's review, the SADBUS shall review each proposed acquisition to determine the feasibility of recommending award to the Small Business Administration (SBA) pursuant to section 8(a) of the Small Business Act. When it cannot be awarded to SBA pursuant to section 8(a), the SADBUS shall review the proposed acquisition to determine if it can be recommended as a set-aside under one of the set-aside priorities stated in FAR 19.504. The SADBUS's recommendation shall be entered on Form HHS-653, Small Business-Labor Surplus Set-Aside Review Form, with the reasons for the type of set-aside recommended, or the reasons for not recommending a set-aside, and provided to the contracting officer. Upon receipt of the Form HHS-653, the contracting officer shall promptly concur or nonconcur with the SADBUS's recommendation. The contracting officer will make the final determination as to whether the proposed acquisition will be set-aside or not. If the contracting officer approves the SADBUS's set-aside recommendation, the proposed acquisition will be set-aside as specified. However, if the contracting officer disapproves the SADBUS's set-aside recommendation, the reasons must be documented on the Form HHS-653, and the form signed. (See 319.505 for options available to the SADBUS regarding the contracting officer's disapproval of a set-aside recommendation.) In all cases, the completed Form HHS-653 is to be retained by the contracting officer and placed in the contract file.

319.503 Setting aside a class of acquisitions.

319.503-70 Small business class set-aside for construction,
repair, and alteration work.

A small business class set-aside is considered to have been made for each proposed acquisition for construction, repair and alteration work in an estimated amount ranging from \$2,500 to \$2 million. Accordingly, the contracting officer shall set aside for small business each proposed acquisition. If, in his/her judgment, the particular acquisition falling within the dollar

Set-Asides for Small Business

limits specified above is unsuitable for a set-aside for exclusive small business participation, the procedure set forth in FAR 19.506 shall apply. Proposed acquisitions for construction, repair, and alteration work in an estimated amount of more than \$2 million shall be processed on a case by case basis.

319.505 Rejecting set-aside recommendations.

(a) If the contracting officer rejects the **SADBUS's** recommendation for a set-aside and an SBA procurement center representative (PCR) is not assigned or available, the **SADBUS** may **appeal**, in writing, to the head of the contracting activity (HCA) or his/her designee. The **SADBUS** shall provide the HCA or designee all the pertinent information concerning the set-aside disagreement, and the HCA shall respond in writing within seven business days. The **HCA's** decision is final and not appealable.

The decision by the HCA shall be attached to the Form HHS-653 and placed in the contract file. After receipt of a final decision by the HCA, and if the decision approves the action of the contracting officer, the **SADBUS** shall forward, for information and management purposes, complete documentation of the case to the OSDBU Director. Documentation transmitted shall include, as a minimum, a copy of the appeal memorandum submitted to the HCA, a copy of the IFB or RFP, a list of proposed sources, a copy of the Form HHS-653 and attachments completed by the **SADBUS** and the contracting officer, a copy of the **HCA's** decision, and all other written material considered by the HCA in arriving at the decision. The **SADBUS'** transmittal memorandum shall contain an affirmative statement that the attachments constitute the complete file reviewed and considered by the HCA in making the final decision.

If an SBA PCR is assigned or available and the **SADBUS** refers the case to that person, the SBA PCR may either concur with the decision of the contracting officer not to set-aside the proposed acquisition or recommend to the contracting officer that it be set-aside. For the SBA PCR to make a comprehensive review, at least the following should be provided as attachments to the Form HHS-653: the statement of work, evaluation criteria, Government cost estimate, source list including size of firms, and a copy of any justification for other than small business considerations that may be applicable. Once the case has been referred to the SBA PCR, no further **appeal action** shall be taken by the **SADBUS**. (Refer to FAR 19.505 for the procedures available to the SBA PCR if the contracting officer rejects the set-aside recommendation.)

Set-Asides for Small Business

319.506 Withdrawing or modifying set-asides.

(a) Reserved.

(b) If an SBA PCR is not assigned, the disagreement between the contracting officer and the SADBUS shall be referred to the HCA for resolution.

(c) Reserved.

(d) Immediately upon notice from the contracting officer, the SADBUS shall provide telephone notification regarding all set-aside withdrawals to the OSDBU Director.

319.570 Contract payments.

Contract payments to small business concerns must be made on a timely basis. Payment of an invoice or voucher must be made within 30 days after receipt of the invoice or voucher or from acceptance of the goods or services. Each invoice or voucher from a small business concern not sent directly to the servicing finance office, but received by the contracting activity, shall be stamped or otherwise identified for expedited payment before it is forwarded to the servicing finance office.

Subpart 319.7

Subcontracting with Small Business and
Small Disadvantaged Business Concerns

319.705 Responsibilities of the contracting officer under the
subcontracting assistance program.

319.705-2 Determining the need for a subcontracting plan.

The dollar value of all proposed incremental funding actions shall be included in determining whether the acquisition meets the dollar threshold requiring a subcontracting plan. The subcontracting plan shall be based on the total value of the acquisition which will include the value of all option quantities or funding actions.

319.705-3 Preparing the solicitation.

The SBA PCR should be allowed a period of one to five business days for the review of the solicitation, depending upon the circumstances and complexity of the individual acquisition.

319.705-4 Reviewing the subcontracting plan.

The offeror's/bidder's subcontracting plan for small business concerns shall be judged independently of the subcontracting plan for small disadvantaged business concerns. If a subcontracting plan is not obtained, the contracting officer must document the contract file to substantiate the reasons why the plan was not obtained. The contracting officer must obtain a satisfactory subcontracting plan prior to awarding the contract.

(a) - (c) Reserved.

(d) If the contracting officer determines that the subcontracting plan submitted reflects the best effort by the offeror/bidder to award subcontracts to small and small disadvantaged business concerns, but the SADBUS disagrees with the contracting officer's determination, a final determination shall be

Subcontracting with Small Business and
Small Disadvantaged Business Concerns

made by the principal official responsible for acquisition. The **SADBUS** shall submit this final determination to the Director, OSDBU with the appropriate supporting documentation.

(1) The contracting officer may accept the terms of an overall or "**master**" company subcontracting plan if it is incorporated by reference into a specific subcontracting plan submitted by the apparent successful offeror/bidder for a specific contract, if:

(i) The master plan contains all the elements required by the statute;

(ii) Subcontracting goals for small and small disadvantaged business concerns are specifically set forth in each contract or modification over the statutory thresholds;

(iii) Any changes to the plan deemed necessary and required by the contracting officer in areas other than goals are specifically set forth in the contract or modification;

(iv) The contracting officer has copies of the entire plan:
and

(v) The SBA PCR has had an opportunity to comment on the master plan.

(2) If the prime contract is for a commercial product, the required subcontracting plan may relate to the company's production of the item generally (both for the Government contract and for regular commercial sale) rather than solely to the item being acquired under the Government contract. In such cases, the contractor shall be required to submit one **company-**wide, annual plan to be reviewed for approval by the first agency with which it enters into a prime contract (which requires

Subcontracting with Small Business and
Small Disadvantaged Business Concerns

a subcontracting plan) during the fiscal year. The approved plan will remain in effect for the entire fiscal year and is applicable to all deliveries made under contracts entered into during the contractor's fiscal year, even though these deliveries are made in a succeeding fiscal year. The contractor shall submit a new plan to the first agency with which it enters into a contract (over the statutory threshold) during a succeeding fiscal year. The new plan shall apply to **all** deliveries made under contracts entered into during the succeeding fiscal year, no matter when the deliveries are made.

319.705-5 Awards involving subcontracting plans.

(a) (1) and (2) Reserved.

(3) The SBA PCR shall be **allowed** a period of one to five **business** days to review the contract award package, depending upon the circumstances and **complexity** of the individual acquisition.

319.705-6 Postaward responsibilities of the contracting officer.

The **SADBUS** shall perform the distribution requirements stated in paragraphs (a) through (c) of FAR 19.705-6. A copy of any company-wide plans and associated approvals shall also be sent to the Director, OSDDBU by the **SADBUS**. In addition, the **SADBUS** is responsible for **summarizing** and reporting to the Director, OSDDBU, on a quarterly basis, **all** prime contracts \$500,000 and over (\$1 million for construction) using the following reporting format:

- (a) Name of the OPDIV and program office;
- (b) Number and dollar amount of contracts requiring subcontracting plans;
- (c) Number of contracts with subcontracting plans;
- (d) Number of contracts without subcontracting plans;
- (e) Small and small disadvantaged business subcontracting goals; and
- (f) Statements citing reasons why small and small disadvantaged business subcontracting plans were not included in the contracts.

Subcontracting with Small Business and
Small Disadvantaged Business Concerns

319.706 Responsibilities of the cognizant administrative contracting officer.

(a) The contracting officer **shall** comply with the requirements of FAR **19.706(a)**, and shall use **the** Standard Form 294, **Subcontracting** Report for Individual Contracts, to monitor the contractor's progress in achieving both the small business and small disadvantaged business subcontracting goals. The contracting officer shall require the contractor to provide in the Remarks block of each Standard Form 294 submitted a narrative of the progress **in fulfilling** the **small** business and small disadvantaged business subcontracting goals. **The** contracting officer shall require the contractor to report any difficulties in achieving the goals and the actions being taken by the contractor to overcome the **difficulties**. The contracting officer shall document the contract file whenever the contractor is experiencing difficulties in achieving the planned subcontracting goals, and shall indicate the actions taken by the contractor to *resolve* the difficulties and the actions taken by the contracting officer to remedy the situation. A copy of this documentation shall be provided to **the SADBUS**.

(b) At the time of physical completion of the contract, **the** contracting officer shall prepare a memorandum for record for inclusion in the contract file indicating whether or not the contractor complied with the subcontracting plan and subcontracting provisions of the contract.

(1) If the contractor achieved its subcontracting dollar goals for both small business and **small** disadvantaged business, the memorandum shall state that the contractor complied with the subcontracting plan and provisions of the contract. No other documentation is needed.

(2) If the contractor failed to achieve its subcontracting dollar goals for either small business or small disadvantaged business, or both, the contracting officer shall indicate **this** failure in the memorandum and determine whether the contractor did or did not exercise its best efforts in attempting to achieve the goals.

(i) If determined that the contractor exercised its best efforts, the contractor shall be found to have complied with the subcontracting plan and provisions of the contract. The rationale for this determination shall be documented in the **memorandum**.

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(ii) If determined that the contractor did not exercise its best efforts, the contractor shall be found to have not complied with the subcontracting plan and provisions of the contract. The reasons for this determination shall be documented in the memorandum, along with a description of specific actions taken by the contracting officer during the performance of the contract to attempt to remedy the failure.

(c) A copy of the memorandum pertaining to either situation described in paragraph (b)(2)(i) or (ii) above shall be sent to the Director, Office of Small and Disadvantaged Business Utilization.

Subpart 319.8

Contracting with the Small Business Administration
(The 8(a) Program)

319.800 General.

(a) and (b) Reserved.

(c) The signing of the contract document may be accepted as the Small Business Administration's (SBA) certification that SBA is competent to perform a specific HHS requirement.

319.803 Selecting acquisitions for the 8(a) Program.

(a) and (b) Reserved.

(c) Brochures of 8(a) concerns which have been interviewed by the Office of Small and Disadvantaged Business Utilization (OSDBU) are forwarded to each small and disadvantaged business utilization specialist (SADBUS). These brochures are to be reviewed by the **SADBUS** to match HHS requirements with the capabilities of these concerns. The **SADBUS** will make the capabilities of these concerns known to program personnel and will obtain information, as needed, by contacting OSDBU or SBA.

319.812 Contract administration.

(a) Reserved.

(b) The responsibility for subcontract administration and field inspection will, in most cases, be delegated by SBA to the contracting activity. The contracting activity may develop a tripartite agreement for execution by SBA, the 8(a) subcontractor, and the contracting activity instead of developing separate modifications for the SBA contract and the 8(a) subcontract.

(c) Some 8(a) concerns may need additional management expertise for optimal performance and completion of a particular contract. Therefore, when subcontract administration is delegated to HHS by SBA, the contracting activity shall promptly apprise the SBA, the **SADBUS**, and OSDBU whenever the contractor is experiencing problems. SBA should provide necessary technical assistance so the contractor can successfully complete the contract.

(d) The OSDBU, **SADBUS**, and SBA are to be notified prior to

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(The 8(a) Program)

initiating final action to terminate an 8(a) contract.

319.870 Liaison with the Small Business Administration.

(a) Contracting activities will maintain a continuous liaison with the SBA to ensure that the overall goals of each activity are achieved. In the event there is a dispute between the contracting activity and a SBA representative regarding any aspect of 8(a) contracting, the contracting activity must promptly notify OSDBU.

(b) The business development responsibility of SBA requires them to assist in and monitor the growth and development of all 8(a) concerns. Therefore, it is incumbent upon HHS to assist SBA in this effort by utilizing the source selection process in a manner that would make use of the largest possible number of 8(a) concerns.

Part 320

Labor Surplus Area Concerns

Subpart 320.1 - GENERAL

Section
320.102

General policy.

Subpart 320.1

General

320.102 General policy.

Contracting activities should obtain appropriate publications and other information identifying labor surplus areas from:

U.S. Department of Labor
Employment and Training Administration
Office of Policy Evaluation and Research
Division of Labor Market Information
Washington, D.C. 20530

Contracting officers shall use the "Directory of Labor Surplus Area **Contractors,**" provided by the Office of Small and Disadvantaged Business Utilization, as a source to identify labor surplus area concerns and to augment other labor surplus area source lists. Contracting officers should also seek to identify concerns from labor surplus areas by placing sources sought synopses in the Commerce Business Daily. Small and disadvantaged business utilization specialists shall assist contracting officers in developing and maintaining source lists of small business and other concerns in labor surplus areas. Department of Commerce and SBA regional and field offices should **be con-**tacted for assistance in identifying **labor** surplus area concerns.

Part 322

Application of Labor Laws to Government Acquisitions

Subpart 322.6 ■ Walsh-Healey Public Contracts Act

Section

322.604

Exemptions.

322.604-2

Regulatory exemptions.

Subpart 322.6

Walsh-Healey Public Contracts Act

322.604 Exemptions.

322.604-2 Regulatory exemptions.

(a) and (b) Reserved.

(c)(1) The actions required by FAR 22.604-2(c)(1) shall be exercised by the Director, Office of Acquisition and Grants Management (DOAGM). Contracting offices requiring exemptions shall forward requests through normal acquisition channels to the DOAGM .

Part 323

Environment, Conservation,
and Occupational Safety

Subpart 323.70 - Safety and Health

Section

323.7000	Scope of subpart.
323.7001	General.
323.7002	Policy.
323.7003	Actions required.
323.7004	Contract clause.
323.7005	Solicitation notice - construction.

Subpart 323.70

Safety and Health

323.7000 Scope of subpart.

This subpart prescribes the use of a safety and health **clause** in contracts involving hazardous material or operations, and procedures for developing and administering safety and health provisions.

323.7001 General.

Various **statutes** and regulations (e.g., Walsh-Healey Act: Service Contract Act) require adherence to minimum safety and health standards by **contractors** engaged in potentially hazardous work. Positive action to reduce accidents and conditions hazardous to health under all contracts is in the Government's interest since the cost of such accident and health hazards is borne by the Government through higher prices and sometimes **by** direct indemnification of contractors **against** liability claims.

323.7002 Policy.

(a) The guidance contained in FAR Subpart 23.3 shall be used for hazardous material as **a** first line of reference. When that guidance is judged insufficient or does not **meet** the safety and health situation in the instant acquisition, this subpart is to be followed.

(b) Whenever the performance of a contract will require use **of** hazardous materials or operations, the contracting activity shall require the prime contractor and subcontractors to:

(1) Provide protection for the life and health of HHS employees, contractor employees, other persons involved with work on HHS programs and projects, and the public:

(2) Avoid accidental **work** interruptions which could delay progress **of** HHS programs and projects;

(3) Maintain controls for the prevention of damage and loss to property; and

(4) Accumulate and provide data necessary for analysis of risk **and** loss factors relating to HHS programs and projects.

Safety and Health

323.7003 Actions required.

(a) Contracting activities. Contracting activities shall use the clause set forth in **352.223-70** as a guide in developing appropriate safety and health clauses for use in prospective contracts involving the following:

- (1) Services or products;
- (2) Research, development, or test projects;
- (3) Transportation of hazardous materials; and
- (4) Construction, including construction of facilities on the contractor's premises.

(b) Safety officers. OPDIV safety officers shall advise **and assist initiators** of acquisition requests and contracting officers in:

- (1) Determining whether safety and health provisions should be included in a prospective contract;
- (2) Selecting or developing safety and health clause provisions for incorporation in a prospective contract;
- (3) Evaluating a prospective contractor's safety and health programs; and
- (4) Conducting post-award review and surveillance to the extent deemed necessary.

(c) Initiators. Initiators of acquisition requests for items described in paragraph (a) of this section shall:

- (1) During the preparation of a request for contract, and in the RFP or IFB:
 - (i) Ensure that hazardous materials and operations to be utilized in the performance of the contract are clearly identified; and

Safety and Health

(ii) Coordinate with the appropriate safety officer to ensure that all hazardous materials and operations are evaluated and that adequate safety requirements are established in the RFP or IPB.

(2) During the period of performance:

(i) Apprise the **contracting** officer **of** any noncompliance with safety and health provisions identified in the contract:
and

(ii) Cooperate with the safety officer in conducting review and surveillance activities.

323.7004 Contract clause.

All contracts which require the use of hazardous materials or operations shall include a clause to provide adherence to minimum safety and health standards. The clause set forth in 352.223-70 may be used or appropriately modified to meet the needs of the individual contract.

323.7005 Solicitation notice - construction.

The contracting officer is to include the notice in 352.223-71 in all solicitations for construction and construction services. A similar notice is to be included in all contracts resulting from those solicitations.

Part 324

Protection of Privacy
and Freedom of Information

Subpart 324.1 - Protection of Individual
Privacy

Section

324.100 Scope of subpart.

324.102 General.

324.103 Procedures.

Subpart 324.2 - Freedom of Information Act

324.202 Policy.

Subpart 324.70 - Confidentiality of
Information

324.7001 General.

324.7002 Policy.

324.7003 Applicability.

324.7004 Required clause.

Subpart 324.1

Protection of Individual Privacy

324.100 Scope of subpart.

This subpart implements 45 CFR part 5b, Privacy Act Regulations, and FAR Subpart 24.1, Protection of Individual Privacy, which implement the Privacy Act of 1974 (P.L. 93-579, December 31, 1974; 5 U.S.C. 552a) and OMB Circular No. A-108, July 9, 1975.

324.102 General.

(a) It is the Department's policy to protect the privacy of individuals to the maximum possible extent while permitting the exchange of records required to fulfill the Department's administrative and program responsibilities and its responsibilities for disclosing records to which the general public is entitled under the Freedom of Information Act (5 U.S.C. 552).

The Privacy Act of 1974 and the Department's implementation under 45 CFR Part 5b apply "when an agency provides by a contract for the operation by or on behalf of the agency of a system of records to accomplish any agency function...". The key factor is whether a departmental function is involved. Therefore, the Privacy Act requirements apply to a departmental contract when, under the contract, the contractor must maintain or operate a system of records to accomplish a departmental function.

(b) - (d) Reserved.

(e) The program official, and, as necessary, the official designated as the activity's Privacy Act Coordinator and the Office of General Counsel, shall determine the applicability of the Act to each proposed acquisition. The program official is required to include a statement in the request for contract indicating whether the Privacy Act is or is not applicable to the proposed acquisition.

(f) Whenever the contracting officer is informed that the Privacy Act is not applicable, but the resultant contract will involve the collection of individually identifiable personal data by the contractor, the contracting officer shall include provisions to protect the confidentiality of the records and

Protection of Individual Privacy

the privacy of individuals identified in the records (see Subpart 324.70).

324.103 Procedures.

(a) All requests for contract shall be reviewed by the contracting officer to determine whether the Privacy Act requirements are applicable. If applicable, the contracting officer shall include the solicitation notification and contract clause required by FAR 24.104 in the solicitation, and the contract clause in the resultant contract. In addition, the contracting officer shall ensure that the solicitation notification, contract clause, and other pertinent information specified in this subpart are included in any contract modification which results in the Privacy Act requirements becoming applicable to a contract.

(b)(1) The contracting officer shall identify the system(s) of records on individuals in solicitations, contracts, and contract modifications to which the Privacy Act and the implementing regulations are applicable.

(2) The contracting officer shall include a statement in the contract notifying the contractor that the contractor and its employees are subject to criminal penalties for violations of the Act (5 U.S.C. **552a(i)**) to the same extent as employees of the Department. The statement shall require that the contractor assure that each contractor employee knows the prescribed rules of conduct, and each contractor employee is aware that he/she can be subjected to criminal penalties for violations of the Act. The contracting officer shall provide the contractor with a copy of the rules of conduct and other requirements set forth in 45 CFR **5b**.

(c) The contracting officer shall include in the contract the disposition to be made of the system(s) of records on individuals upon completion of performance of the contract. For example, the contract may require the contractor to completely destroy the records, to remove personal identifiers, to turn the records over to the Department, or to keep the records but take certain measures to keep the records confidential and protect the individuals' privacy.

Protection of Individual Privacy

(d) Whenever an acquisition is determined to be subject to the Privacy Act requirements, a "system notice," prepared by the program official and describing the Department's intent to establish a new system of records on individuals, to make modifications to an existing system, or to disclose information in regard to an existing system, is required to be published in the Federal Register. A copy of the "system notice" shall be attached to the request for contract or purchase request. If a "system notice" is not attached, the contracting officer shall inquire about its status and shall obtain a copy from the program official for inclusion in the contract file. If a "system notice" has not been published in the Federal Register, the contracting officer may proceed with the acquisition but shall not award the contract until the "system notice" is published, and publication is verified by the contracting officer.

Subpart 324.70

Confidentiality of Information

324.7001 General.

In the performance of certain HHS contracts, it is necessary for the contractor to generate data, or be furnished data by the Government, which **is** about individuals, organizations, or Federal programs. This subpart and the accompanying contract clause require contractors to prudently handle disclosure of certain types of information not subject to the Privacy Act or the HHS human subject regulations set forth in 45 CFR Part 46. This subpart and contract clause address the kinds of data to be generated by the contractor and/or data to be furnished by the Government that are considered confidential and how it should be treated.

324.7002 Policy.

It is the policy of HHS to protect personal interests of individuals, corporate interests of non-governmental organizations, and the capacity of the Government to provide public services when information from or about individuals, organizations, or Federal agencies is provided to or obtained by contractors in performance of HHS contracts. This protection depends on the contractor's recognition and proper handling of such information. As a result, the "Confidentiality of Information" contract clause was developed.

324.7003 Applicability.

(a) The "Confidentiality of Information" clause, set forth in **352.224-70**, should be used in solicitations and resultant contracts whenever the need exists to keep information confidential. Examples of situations where the clause may be appropriate include:

(1) Studies performed by the contractor which generate information or involve Government-furnished information that is personally identifiable, such as medical records, vital statistics, surveys, and questionnaires;

(2) Contracts which involve the use of salary structures, wage schedules, proprietary plans or processes, or confidential financial information of organizations other than the contractor's; and

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(3) Studies or research which may result in preliminary or unvalidated findings which, upon disclosure to the public, might create erroneous conclusions which, if acted upon, could threaten public health or safety.

(b) With regard to protecting individuals, this subpart and contract clause are not meant to regulate or control the method of selecting subjects and performing studies or experiments involving them. These matters are dealt with in the HHS regulation entitled "Protection of Human Subjects," 45 CFR Part 46. If a system of records under contract, or portions thereof, is determined to be subject to the requirements of the Privacy Act, in accordance with FAR 24.1 and 324.1 and Title 45 CFR Part **5b**, the procedures cited in those references are applicable and the Privacy Act contract clause shall be included in the contract. If the contract also involves confidential information, as described herein, which is not subject to the Privacy Act, the contract shall include the "Confidentiality of Information" clause in addition to the Privacy Act **clause**.

324.7004 Required clause.

The clause set forth in 324.7004 shall be included in any RFP and resultant contract(s) where it has been determined that confidentiality of information provisions may **apply**. Any RFP announcing the intent to include this clause in any resultant contract(s) shall indicate, **as** specifically as possible, the types of data which would be covered and requirements for handling such data.

Part 325

Foreign Acquisition

Subpart 325.1 - Buy American Act - Supplies

Section

325.102

Policy.

325.108

Excepted articles, materials, and supplies.

325.108-70

Formats for nonavailability determinations.

Subpart 325.3 - Balance of Payments Program

325.302

Policy.

Subpart 325.1

Buy American Act - Supplies

325.102 Policy.

(a) Reserved.

(b) The head of the contracting activity shall make the determinations required by FAR **25.102(a)(1)** through (5) and FAR **25.102(b)**.

325.108 Excepted articles, materials, and supplies.

(a) Reserved.

(b) Articles, materials, and supplies not listed in FAR 25.108(d) may be excepted only after a written determination has been made by the head of the contracting activity. These determinations are required **only in** instances where it has been determined that only suppliers of foreign source end items shall be solicited. However, approvals and determinations covering individual acquisitions in the following categories may be made by the contracting officer:

(1) Acquisition of spare and replacement parts for foreign manufactured items, if the acquisition must be restricted to the original manufacturer or its supplier; and

(2) Acquisition of foreign drugs when it has been determined, in writing, by the responsible program official, that only the requested foreign drug will fulfill the requirement.

Formats for the above referenced written determinations are shown in **325.108-70**.

325.108-70 Formats for nonavailability determinations.

(a) The following is the format for a nonavailability **determination** made by a contracting officer:

DETERMINATION OF NONAVAILABILITY

Pursuant to the authority contained in section 2, Title III, of the Act of March 3, 1933, popularly called the Buy American Act (41 U.S.C. **10(a-d)**),

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and authority delegated to me by 325.108(b), I hereby find that:

(a) (Insert a description of the item ~~or~~ items to be acquired, including unit, quantity, and estimated cost inclusive of duty and transportation costs to destination.)

(b) (Enter the name and address of the proposed contractor or supplier, and country of origin of the item or items.)

(c) (Include a brief statement of the necessity for the acquisition.)

(d) (Include a statement of facts establishing the nonavailability of a similar item or items of domestic origin. If there is no known domestic item or items which can be used as a reasonable substitute, a statement to this effect will be made.)

Based upon these findings, it is determined that the above-described item(s) is (are) not mined, produced, or manufactured, or the articles, materials, or supplies from which it (they) is (are) manufactured, are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available **commercial** quantities and of a satisfactory quality.

Accordingly, the requirement of the Buy American Act that acquisition be made from domestic sources and that it be of domestic origin is not applicable to this acquisition, since the referenced acquisition is within the **non-**availability exception stated in the Buy American Act. Authority is granted to acquire the above-described **item(s)** of foreign origin (country of **origin**) at an **estimated** total cost of \$_____, including duty and transportation cost to **destination**.

(Date)

(Contracting Officer)

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(b) The following is the format for a nonavailability determination made by the head of the contracting activity. Part 1 of the determination shall be signed by the preparing authority (contracting officer or official with contracting authority), and Part 2 shall be signed by the approving authority.

DETERMINATION OF NONAVAILABILITY

Part 1

Date _____

Pursuant to the authority contained in Section 2, Title III, of the Act of March 3, 1933, popularly called the Buy American Act (41 U.S.C. **10(a-d)**),

I hereby find:

(a) (Insert a description of the item or items to be acquired, including unit, quantity, and estimated cost inclusive of duty and transportation costs to destination.)

(b) (Insert a brief statement of the necessity for the acquisition.)

(c) (Include a statement of facts establishing the nonavailability of a similar item or items of domestic origin.)

Based upon the above showing of fact, it is determined **that** the above described item(s) is (are) not mined, produced, or manufactured, or the articles, materials, or supplies from which it (they) is (are) manufactured, are not mined, produced or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

(Signature)

Buy American Act - Supplies

Part 2

The requirement of the Buy American Act that acquisition be made from domestic sources and that it be of domestic origin is not applicable to the above described acquisition, since the referenced acquisition is within the **nonavail-**ability exception stated in the Act. The feasibility of foregoing the requirement or providing a United States substitute has been considered. Authority is granted to acquire the above described item(s) of foreign origin (country of origin) at an estimated total cost of \$_____, including duty and transportation costs to **destination.**

(Signature) ---

Subpart 325.3

Balance of Payments Program

325.302 Policy.

All determinations addressed in FAR 25.302 shall be made by the principal official responsible for acquisition (not delegable).

Part 328

Bonds and Insurance

Subpart 328.3 - Insurance

Section

328.301

Policy.

328.311

Solicitation provision and contract clause on
liability insurance under cost-reimbursement
contracts.

328.311-2

Contract clause.

Subpart 328.3

Insurance

328.301 Policy.

(a) It is the policy of this Department to limit the Government's reimbursement of its contractors' liability to third persons for claims not covered by insurance in cost-reimbursement contracts to the Limitation of Funds or Limitation of Cost clause of the contract.

(b) In addition to the limitations in (a) above, the amount of the Government's reimbursement will be limited to final judgments or settlements approved in writing by the Government.

328.311 Solicitation provision and contract clause on liability insurance under cost-reimbursement contracts.

328.311-2 Contract clause.

(a) The contracting officer shall insert the clause at 352.228-7, Insurance - Liability to Third Persons, in all solicitations and resulting cost-reimbursement contracts, in lieu of the clause at FAR 52.228-7.

Part 330

Cost Accounting Standards

Subpart 330.2 - CAS Program Requirements

Section

| 330.201-5

Waiver.

Subpart 330.2

CAS Program Requirements

330.201-5 Waiver

(a) and (b) **Reserved.**

(c) The requirements of FAR 30.201-5 shall be exercised by the Director, Office of Acquisition and Grants Management (DOAGM) . Requests for waivers shall be forwarded through normal acquisition channels to the DOAGM.

Subpart 330.70

**Cost of Money for Capital Employed
on Facilities in Use and Capital
Assets Under Construction**

330.7000 Scope and applicability.

This subpart sets forth policies and procedures related to implementation of the **"cost of money"** cost principle set forth in FAR 31.20540. This cost principle deals with costs provided for under Cost Accounting Standard 414, Cost of **Money** as an Element of the Cost of Facilities Capital, and Cost **Accounting** Standard 417, Cost of Money as an Element of the Cost of Capital Assets Under Construction. Although these standards may not be specifically applicable to all contracts subject to the cost principles set forth in FAR Subpart **31.2**, they have been **extended** to all such contracts by FAR 31.205-10 and the provisions of this subpart (but see FAR **15.902(b)**).

330.7001 Cost **of** money for capital employed on facilities in use.

330.7001-1 Policy.

(a) It is Government policy to **recognize** facilities capital cost of money **for** facilities in use as an allowable cost on negotiated contracts subject to FAR Subpart **31.2** that are priced on the basis of **cost analysis** (see FAR **15.902(b)** and **31.205-10(a)**).

(b) This policy shall apply to new contracts and contract modifications adding new **work** awarded on or after **June 15, 1981**. **It** shall apply in the same manner to any tier subcontracts or modifications thereto, **upon** the subcontractor's request, provided the prime contract or modification was eligible as of the date of **award** for facilities capital cost of money in accordance with this paragraph.

330.7001-2 Definitions, measurement, and allocation.

Cost Accounting Standard (CAS) No. 414, Cost of Money as an Element of the Cost of Facilities Capital, reprinted in 4 C.F.R. 414 establishes criteria for the measurement and allocation of the cost of capital committed to facilities as an element of contract cost for historical cost determination purposes. Important features of the CAS **are** its definitions,

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techniques for application, and a prescribed Form CASB-CMF (Facilities Capital Cost of Money Factors Computation) with instructions. This 330.7001 adopts the techniques of CAS 414 as the approved method of measurement and allocation of facilities capital cost of money to overhead pools at the business unit level, and adds only supplementary procedures as are necessary to extend those techniques for contract forward pricing and administration purposes. Therefore, these procedures are intended to be completely compatible with, and an extension of, the definitions, criteria, and techniques of CAS 414. Contractors who computerize their financial data are encouraged to meet the requirements of both CAS 414 and this 330.7001 from the same data bank and programs.

330.7001-3 Estimating business unit facilities capital and cost of money.

The method of estimating the business unit facilities capital and cost of money uses the techniques of CAS 414. Cost of money factors (CMF) by overhead pools at the business unit are developed using Form CASB-CMF. Three elements are required to develop cost of money factors: business unit facilities capital data, overhead allocation base data, and the interest rate promulgated by the Secretary of the Treasury under Pub. L. 92-41. These elements are discussed in this section.

(a) Business unit facilities capital data. The net book value. (acquisition cost less accumulated depreciation) is used for each cost accounting period. The net book value used is the total of (1) the net book value of facilities recorded on the accounting records of the business unit, (2) the capitalized value of leases (see FAR 31.205-2 and 31.205-6), and (3) the net book value of facilities at the corporate or group level that support depreciation charges allocated to the business unit in accordance with the provisions of CAS 403. Projections of facilities capital will be supported by budget plans and/or similar type documentation and the estimated depreciation will be the same as used in projected overhead rates. Projections will accommodate changes in the level of facilities net book value, e.g., facilities additions, deletions of facilities by sale, abandonment or other disposal, idle facilities (see FAR 31.205-17).

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(b) Overhead allocation bases. The base data used to compute the CMF must be the same as that used to compute the proposed overhead rates. **CMF's** should be submitted and evaluated as part of the proposal.

(c) Interest rate. For purposes of projection, the most recent interest rate promulgated by the Secretary of the Treasury under Pub. L. 92-41 will be used as the cost of money rate in Column 1 of Form CASB-CMF. Where actual costs are used in definitization actions, the actual treasury rate(s) applicable to the period(s) of the incurred costs will be recognized by development of a composite rate.

(d) Determination of final cost of money. **CMF's** estimated in accordance with the above procedures are used to **develop** the facilities investment **base** used in forward pricing. Actual **CMF's** are required when it is necessary to determine final allowable costs for cost settlement and/or repricing in accordance with CAS 414 and FAR 31.205-10(a).

330.7001-4 Contract facilities capital estimates.

(a) After the appropriate Forms CASB-CMF have been analyzed and **CMF's** have been developed, the contracting officer is in a position to estimate the facilities capital cost of money and capital employed for a contract proposal. DD Form 1861, Contract Facilities Capital and Cost of Money, is to be used for this purpose. An evaluated contract cost breakdown reduced to the contracting officer's prenegotiation cost objective, must be available. The procedure is similar to applying overhead rates to appropriate overhead allocation bases to determine contract overhead costs.

(b) DD Form 1861 provides for listing overhead pools and direct-charging service centers (if used) in the same structure they appear on the contractor's cost proposal and Forms CASB-CMF. The structure and allocation base units-of-measure must be compatible on all **three** displays. The base for each overhead **pool** must be broken down by year to match each separate Form CASB-CMF. Appropriate contract overhead allocation base data are extracted by year from the evaluated cost breakdown or prenegotiation **cost objective**, and are listed against each separate Form CASB-CMF. Each allocation base is multiplied by

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its corresponding cost of money factor to get the facilities capital cost of money estimated to be incurred each **year**. The sum of these products represents the estimated contract facilities capital cost of money for the year's effort. Total contract facilities capital cost of money is the sum of the yearly amounts.

(c) Since the facilities capital cost of money factors reflect the applicable cost of money rate in Column 1 of Form CASB-CMF, the contract facilities capital employed can be determined by dividing the contract cost **of** money by the same rate. DD Form 1861 is designed to record and compute all the above in the most direct way possible, and the end result is the contract facilities capital cost of money and capital employed. The capital employed amount may be used to identify the level of facilities investment to be employed in contract performance (see FAR **15.905-1(d)(1)** and **315.905-73(b)(1)**).

330.7001-S Preaward facilities capital applications.

Facilities capital cost of money and capital employed as determined in 330.7001-4 **are** applied in establishing cost and price objectives as follows:

(a) Cost of money.

(1) Cost objective. This special, imputed cost of money shall be used together with normal, booked costs, in establishing a cost objective or the target cost when structuring an incentive type contract. Target costs thus established at the outset, shall not be adjusted as actual cost of money rates become available for the periods during which contract performance takes place.

(2) Profit objective. Cost of money shall not be included as part of the cost base when measuring the contractor's effort in connection with establishing a prenegotiation profit objective. The cost base for this purpose shall be restricted to normal, booked costs (see 315.900-72(b) and 315.900-74(b)).

(b) Facilities capital employed. The profit objective as, it relates to the risk associated with facilities capital employed shall be assessed in accordance with the profit

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guidelines set forth in **315.905-73(b)(1)**.

330.7001-6 Postaward facilities capital applications.

(a) Interim billings based on costs incurred. Contract facilities capital cost of money may be included in cost reimbursement and progress payment invoices. The amount that qualifies as cost incurred for purposes of the "Cost Reimbursement, Fee and Payment" or "Progress Payment" clause of the contract is the result of multiplying the incurred portions of the overhead pool allocation bases by the latest available cost of money factors. Like applied overhead at forecasted overhead rates, such computations are interim estimates subject to adjustment. As each year's data are finalized by computation of the actual cost of money factors under CAS 414 and FAR **31.205-10(a)** the new factors should be used to calculate contract facilities capital cost of money for the next accounting period.

(b) Final settlement. Contract facilities capital cost of money for final cost determination or repricing is based on each year's cost of money factors determined under CAS 414 and supported by separate Forms CASB-CMF. Contract cost must be separately computed in a manner similar to yearly final overhead rates. Also like overhead costs, the final settlement will include an adjustment from interim to final contract cost of money. However, estimated or target cost will not be adjusted.

330.7001-7 Administrative procedures.

(a) Contractor submission of Forms CASB-CMF will normally be initiated under the same circumstances as forward pricing rate agreements (see FAR 15.809) and evaluated as complementary documents and procedures. Separate forms are required for each prospective cost accounting period during which Government contract performance is anticipated. If the contractor does not annually negotiate forward pricing rate agreements, submissions may nevertheless be made annually or with individual contract pricing proposals, as agreed to be the contractor and the contracting officer. The contracting officer shall, with the assistance of the cognizant auditor, evaluate the cost of money factors, and retain approved factors with other negotiated

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forward pricing data and rates.

(b) The contracting officer will complete a DD Form 1861, Contract Facilities Capital and Cost of Money, after evaluating the contractor's cost proposal and determining the Government prenegotiation cost objective, but before determining the Government prenegotiation profit objective.

(c) A final Form CASB-CMF must be submitted by the contractor under CAS 414 as soon after the end of each cost accounting period as possible, for the purpose of final cost determinations and/of repricing. The submission should accompany the contractor's proposal for actual overhead costs and rates, and be evaluated as complementary documents and procedures.

330.7002 Cost of money for capital employed on capital assets under construction.

330.7002-1 Policy.

(a) It is Government policy to recognize a contractor's investment in capital assets while these are being constructed, fabricated, or developed for the contractor's own use (see FAR **31.205-10(b)**). This recognition is **made** through the allowance of an imputed cost of money amount which is (1) calculated in accordance with Cost Accounting Standard (**CAS**) 417, Cost of Money as an Element of the Cost of Capital **Assets** Under Construction (See 4 C.F.R. **417**), and the instructions in 330.7002-3, (2) capitalized along with the other costs of the asset for which the investment is made, and (3) allocated to Government contracts in accordance with 330.7002-4.

330.7002-2 Definitions.

The following definitions have been **taken** or developed from CAS 417 which is reprinted **in** 4 C.F.R. 417.

(a) Intangible capital asset. An asset that has no physical substance, more than minimal value, and is expected to be held by an enterprise for continued use-or possession beyond the current accounting period for the benefit it yields.

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(b) Tangible capital asset. An asset that has physical substance, more than minimal **value**, and is expected to **be** held **by an** enterprise for continued use or possession beyond the current accounting period for the service it yields.

(c) Cost of money rate. The cost of money rate is either the **interest** rate determined by the Secretary of the Treasury under Pub. L. 92-41 (85 Stat. **97**), or the time-weighted **average** of such rates for each cost accounting period **during** which the asset is being constructed, fabricated, or developed. The time-weighted average interest rate is calculated by multiplying the various rates in effect during the months of construction by the number of month(s) each rate was in effect. The sum of the products is divided by the total number of months in which the rates were experienced.

(d) Representative investment. The representative investment is the calculated amount considered invested **by** the contractor in the project to construct, fabricate, or develop the asset during the cost accounting period. In calculating the representative investment, consideration **must** be given to the rate or expenditure pattern of the investment, i.e., if **most** of the investment was at the end of the cost accounting period, the representative investment calculation must reflect this fact.

(1) If the contractor experiences an irregular or uneven expenditure pattern in the construction, fabrication, or development of a capital asset, i.e., a majority of the construction costs were incurred toward the beginning, middle, or end of the cost accounting period, the contractor must either:

(i) Determine a representative investment **amount** for the cost accounting period **by** calculating the average of the **month-end** balances for that cost accounting period, or

(ii) Treat month-end balances as individual representative investment amounts.

(2) If the construction, fabrication, or development costs were incurred in a fairly uniform expenditure pattern throughout the construction period, the contractor may:

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(i) Determine a representative investment amount for the cost accounting period by averaging the beginning and ending balances of the construction, fabrication, or development cost account for the cost accounting period; or

(ii) Treat month-end balances as individual representative investment amounts.

330.7002-3 Measurement.

(a) The imputed cost of money for **an asset under** construction, fabrication, or development is calculated by applying a cost of money **rate** (see **330.7002-2(c)**), to the representative investment amount (see 330.7002-2(d)).

(1) When a representative investment amount is determined for a cost accounting period **in accordance** with 330.7002-2(d)(I)(i) or **330.7002-2(d)(2)(i)**, the cost of money rate used shall be the time-weighted average rate.

(2) When a monthly representative investment amount (see **330.7002-2(d)(1)(ii)** or **330.7002-2(d)(2)(ii)**) is used, the cost of money rate shall ~~be~~ the rate in effect each month. (Note-- Under this method, the cost of money calculation is made monthly and the total for the cost accounting period is the **sum** of the monthly calculations.)

(b) The method chosen by a contractor for determining the representative investment amount **may** be different for each capital asset being constructed, fabricated, or developed as long as the method fits the expenditure pattern of the construction costs incurred.

(c) The imputed cost of money will be capitalized only once in any cost accounting period, either **at** the end of the period or at the end of the construction period, whichever comes first.

(d) When the construction of **an asset takes more** than one cost accounting period, the cost of money capitalized for the first cost accounting period will be included in determining the representative investment amount for any future cost accounting periods.

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330.7002-4 Composition and allocation of costs.

(a) The cost of money for a tangible capital asset determined in accordance with 330.7002-2 and 330.7002-3 shall be capitalized along with the other construction, fabrication, or development costs of that asset for purposes of depreciation under FAR 31.205-11.

(b) The cost of money for an intangible capital asset determined in accordance with 330.7002-2 and ~~330.7002-3~~ shall be capitalized along with other construction, fabrication, or development costs of that asset and amortized over appropriate cost accounting periods.

(c) Where CAS 414 cost of money is allocated to construction, fabrication, or development effort in accordance with 330.7001, it will be recognized and considered an element of total construction costs and be included in all calculations of the asset's representative investment amount.

330.7002-S Limitations.

If substantially all activities necessary to get an asset ready for its intended use are discontinued, cost of money shall not be capitalized for the period of discontinuance, except when such discontinuance arises out of causes beyond the control and without the fault or negligence of the contractor.

330.7002-6 Preaward capital employed application.

An offset to the profit objective as discussed in 315.905-74 for CAS 414 cost of money is not required for CAS 417 cost of money.

Part 332

Contract Financing

Subpart 332.4 • Advance Payments

Section

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332.403 Applicability.
332.406 Letters of credit.
332.407 Interest.
332.409 Contracting officer action.
332.409-1 Recommendation for approval.

Subpart 332.5 • Progress Payments Based on costs

332.501 General.
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332.702 Policy.
332.703 Contract funding requirements.
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Subpart 332.9 • Prompt Payment

332.902 Definitions.
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Subpart 332.4

Advance Payments

332.402 General.

(a) - (d) Reserved.

(e) The determination that the making of an advance payment is in the public interest (see FAR 32.402(c)(1)(iii)(A)) shall be made by the respective principal official responsible for acquisition (PORA).

332.403 Applicability.

All contracts for research work with educational institutions located in the United States shall provide for financing by use of advance payments, in reasonable amounts, unless otherwise prohibited by law.

332.406 Letters of credit.

(a) and (b) Reserved.

(c)(1) A blanket determination and findings authorizing interest free advance payments under a single letter of credit has been executed and remains in effect for each of the nonprofit organizations listed in Attachment I "Single Letter of Credit Recipients and Central Point Addressees." These determinations and findings are applicable to all existing and future contracts entered into by the Department, its operating divisions, OS staff offices, and regional offices. All contracts with the listed organizations which require advance payments (whether under section 305 of the Federal Property and Administrative Services Act of 1949, as amended, or other statutory authority) shall provide for payment to be made under the appropriate letter of credit. The clause set forth in 352.232-73 shall be included in all such contracts, and the cognizant fiscal office shall be apprised of its inclusion.

(2) In those instances where it is practical and feasible to finance an advance payment under a letter of credit other than one which is incorporated under a single letter of credit described in paragraph (c)(1) above, a determination and findings shall be executed by the PORA if the cited authority is to be section 305 of the Federal Property and Administrative Services Act. In cases where an authority other than section 305 is to be

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used, a determination and findings shall be submitted to the appropriate official authorized by the cited statute to approve the advance payment.

(3) The Treasury Department's letter of credit method of financing advance payments shall be employed, whenever feasible. Department-wide blanket letters of credit, which apply to the financing of research contracts and grants between the institution and all activities of the Department, shall be utilized to the maximum extent practicable. Where a particular educational institution is supported by research contracts and grants with only one operating division of the Department, a single letter of credit, applicable to all research contracts and grants between the institution and that operating division may be employed.

332.407 Interest.

(a) - (c) Reserved.

(d) The **PORA** is authorized to make the determinations in FAR 32.407(d) and as follows. In addition to the interest-free advance payments for the types of contracts listed in FAR 32.407(d), advance payments without interest may be approved for nonprofit contracts which are without fee with educational institutions and other nonprofit organizations, whether public or private, which are for the performance of work involving health services, educational programs, or social service programs, including, but not limited to, programs such as:

(1) Community health representative services for an Indian Tribe or Band;

(2) Narcotic addict rehabilitative services;

(3) Comprehensive health care service program for Model Neighborhood programs;

(4) Planning and development of health maintenance organizations;

(5) Dissemination of information derived from educational research;

(6) Surveys or demonstrations in the field of education:

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(7) Producing *or* distributing educational media for handicapped persons including captioned films for the deaf;

(8) Operation of language or area centers:

(9) Conduct of biomedical research and support services:

(10) Research surveys or demonstrations involving the training and placement of health manpower and health professionals, and dissemination of related information: and

(11) Surveys or demonstrations in the field of social service.

332.409 Contracting officer action.

332.409-1 Recommendation for approval.

The information in PAR X2.409-1 (or FAR 32.409-2) shall be transmitted to the PORA in the form of a briefing memorandum.

Subpart 332.5

Progress Payments Based on Cost

332.501 General.

332.501-2 Unusual progress payments.

(a) (1) and (2) Reserved.

(3) The approval of an unusual progress payment shall be made
by the principal official responsible for acquisition (PORA).

Subpart 332.7

Contract Funding

332.702 Policy.

An incrementally funded contract is a contract in which the total work effort is to be performed over multiple time periods and funds are allotted to cover discernible phases or increments of performance.

(a) The incremental funding technique shall only be applied to cost-reimbursement type contracts for the acquisition of research and development services and other types of nonpersonal services such as studies, surveys, and socioeconomic demonstration projects. It shall not be applied to construction services, architect-engineer services, or services subject to the Service Contract Act of 1965, as amended. The incremental funding technique allows for contracts to be awarded for periods in excess of one year even though the total estimated amount of funds expected to be obligated for the contract are not available at the time of the contract award.

(b) It is departmental policy that contracts for projects of multiple year duration be fully funded, whenever possible, to cover the entire project. However, incrementally funded contracts may be used when:

(1) A project, which is part of an approved program, is anticipated to be of multiple year duration, but funds are not currently available to cover the entire project:

(2) The project represents a valid need of the fiscal year in which the contract is awarded and of the succeeding fiscal years of the project's duration, during which additional funds may be obligated by increasing the allotment to the contract:

(3) The project is so significant to the approved program that there is reasonable assurance that it will command a high priority for proposed appropriations to cover the entire multiple year duration; and

(4) The statement of work is specific and is defined by separate phases or increments so that, at the completion of each, progress can be effectively measured.

32.703 Contract funding requirements.

Contract Funding

332,703-1 General.

(a) Reserved.

(b) The **following** general guidelines are applicable to incrementally funded contracts:

(1) The estimated total cost of the project (all planned phases or increments) is to be taken into consideration when determining the requirements which must be met before entering into the contract; i.e., justification for noncompetitive acquisition, approval of award, etc.

(2) The RFP and resultant contract are to include a statement of work which describes the total project covering the proposed multiple year period of performance and indicating timetables consistent with planned phases or increments and corresponding allotments of funds.

(3) Offerors will be expected to respond to **RFPs** with technical and cost proposals for the entire project indicating distinct break-outs **of** the planned phases or increments.

(4) Negotiations will be conducted based upon the total project, including all planned phases **or** increments, and the multiple year period of performance.

(5) Sufficient funds must be obligated under the basic contract to cover no less than the first year **of** performance, unless the contracting officer determines it is advantageous to the Government to fund the contract for a lesser period. In that event, the contracting officer shall ensure that the obligated funds are sufficient to cover a complete phase or increment of performance representing a material and measurable part of the total **project**, and the contract period shall be reduced accordingly.

(6) Because **of** the magnitude **of** the scope of work and multiple year period of performance under an incrementally funded contract, there is a critical need for careful program planning. Program planning must provide for appropriate surveillance **of** the contractor's performance and adequate controls to ensure that projected funding will not impinge on the program office's ability to support, within anticipated appropriations, other equally important **contract** or grant programs.

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(7) An incrementally **funded** contract must contain precise requirements for *progress* reports to enable the project officer to effectively monitor the contract. The project officer should be required to prepare periodic performance evaluation reports to facilitate the program office's ultimate decision to allot additional *funds under* the contract.

332.704 Limitation *of* cost *or* funds.

For detailed instruction regarding administrative actions in connection with anticipated *cost overruns*, see Subpart 342.71.

332.705 Contract clauses.

332.705-2 Clauses for limitation **of** costs or funds.

(a) and (b) Reserved.

(c) (1) When using the Limitation of Funds clause (*FAR* 52.232-22) in the solicitation and resultant incrementally funded contract, the contracting officer shall insert the following legend between the clause title and the clause text:

(This clause supersedes the Limitation
of Cost clause found in the General
Provisions of this contract.)

(2) The contracting officer shall also include a **clause** reading substantially as that shown in 352.232-74 in the Special Provisions of the *resultant* incrementally funded contract.

(3) The **request** for proposals must inform prospective offerors of the Department's intention to enter into an incrementally funded contract. Therefore, the contracting officer shall include the provision **at 352.232-75** in the request **for** proposals whenever the use of incremental funding is contemplated.

Subpart 332.9

Prompt Payment

332.902 Definitions.

"Fiscal **office**" means the office responsible for: (a) determining whether interest penalties are due a contractor and, if so, the amount, (b) determining whether an invoice offers a financially advantageous discount, (c) maintaining records for and submission of prompt payment reports to the Deputy Assistant Secretary, Finance (DASF), ASMB, OS, and (d) processing payments to the Treasury Department to allow for payment to a contractor when due. The fiscal office shall fulfill the roles of the "designated billing office" and the #designated payment office."

332.905 Invoice payments.

(a)(1)(ii), (b) (4), (c) (5). In most instances, the contracting officer will use the seven (7) day constructive acceptance period (specified in paragraph (a)(6)(i) of the Prompt Payment clause at FAR 52.232-25, paragraph (a)(5)(i) of the Prompt Payment clause at FAR 52.232-26, and paragraph (a)(4) (i) of the Prompt Payment clause at FAR 52.232-27) for solicitations and resultant contracts as the basis for the fiscal office's computation of interest penalties. However, where the contracting officer extends the constructive acceptance period, under the conditions described in FAR 32.905, the extension shall be coordinated with the fiscal office. A constructive acceptance period of less than seven (7) days is **not** authorized.

(j) When the contracting officer mistakenly receives an invoice first, or is specified in the contract as the first recipient of the invoice, and the contract requires payment within thirty (30) days from receipt of a "proper **invoice**" (as defined by **FAR 32.902**), the contracting officer shall review the invoice to determine whether or not it is proper: and, if so, shall approve the invoice and submit it to the fiscal office within sixteen (16) days from the date of receipt. When the contracting officer is the first recipient of the invoice and the contract establishes a payment due date of more than thirty (30) days after receipt, the contracting officer shall review, approve, and submit the "proper **invoice**" to the fiscal office at least fourteen (14) days prior to the payment due date (unless the contracting officer and fiscal office agree, prior to **contract award, to a longer period**).

Part 333

Protests, Disputes, and Appeals

Subpart 333.1 - Protests

Section

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Subpart 333.1

. Protests

333.101 Definitions.

"Filed," as used in this subpart, **means** receipt in the contracting office, the immediate Office of the Secretary, the General Accounting Office (GAO), or the General Services Board of Contract Appeals (GSBCA), as the case may be.

333.102 General.

(a) Contracting officers shall consider all **protests** or objections regarding the award of a contract, whether submitted before **or after** award, provided the protests are filed in a timely manner and are submitted by interested parties. In order to be considered timely, protests based on alleged improprieties in any type of solicitation which **are** apparent before bid opening or the closing date for receipt of proposals **shall** be filed prior to bid opening or the closing date **for** receipt of proposals. In the **case** of negotiated acquisitions, alleged improprieties which **do not** exist in initial **solicitations**, but which are subsequently incorporated by amendment, **must** be protested not later than the next closing date for receipt of **proposals** following the incorporation. In other cases, **protests** shall be filed not later than ten (10) Federal Government working day6 **after** the basic; for protest is known or should have been known, whichever is earlier. Provided a protest has been filed initially with the contracting officer, any subsequent **protest** to the Secretary or GAO filed within ten (10) Federal **Government** working day6 of notification of **adverse** action will be considered. Written confirmation **of** **all** oral protest6 shall be requested from proteatantr and must be timely filed.

| (b) and (c) Reserved.

| (d)(1) The Office of **Acquisition** and Grants Management (**OAGM**), has been designated as the headquarters office to serve as the liaison for protest6 lodged with GAO. Within the **OAGM**, the Departmental Protest Control Officer (**DPCO**) ha6 been designated as the individual to be contacted by GAO.

(2) The Office of the General Counsel-Business and Administrative Law Division (**OGC-BAL**) has been designated to **serve** as the liaison for protest6 lodged with GSBCA.

(3) Each contracting activity shall designate a protest control officer to **serve** a6 an advisor to the contracting officer and to monitor protests from the time of initial notification

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until the protest has been resolved. The protest control officer should be a senior acquisition specialist in the headquarters acquisition staff office. In addition, contracting activities should designate similar officials within their principal components to the extent practicable and feasible. A copy of each appointment and termination of appointment of protest control officers shall be forwarded to the Director, OAGM.

333.103 Protests to the agency.

(a)(2) The contracting officer is authorized to make the determination, using the criteria in FAR 33.103(a), to award a contract notwithstanding the protest after obtaining the concurrence of the contracting activity's protest control officer and OGC-BAL. If the protest has been lodged with the Secretary, is addressed to the Secretary, or requests referral to the Secretary, approval shall also be obtained from the Director, OAGM before making the award.

(3) The contracting officer shall require written confirmation of any oral protest. To be considered timely, the written confirmation must be filed in accordance with the applicable provisions in 333.102(a). In the following cases, written protests received by the contracting officer before award shall be forwarded, through acquisition channels, to the DPCO for processing. Files concerning these protests shall be submitted in duplicate, by the most expeditious means, marked **"IMMEDIATE ACTION--PROTEST BEFORE AWARD"**, and contain the documentation referenced in **333.104(a)(3)**.

(i) The protestant requests referral to the Secretary of Health and Human Services;

(ii.) The protest is known to have been lodged with the Comptroller General or the Secretary, or is addressed to either:
or

(iii) The contracting officer entertains some doubt as to the proper action regarding the protest or believes it to be in the best interest of the Government that the protest be considered by the Secretary or the Comptroller General.

Otherwise, submissions of protests to the DPCO may be dispensed with by the contracting officer if he/she is reasonably satisfied that the protest is groundless. In this instance, the contracting officer, with the concurrence of the contracting activity's protest control officer and OGC-BAL, may disallow the protest.

• HHS Transmittal 91.01 (10/31/91)

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(4) Protests received after award shall be treated as indicated in 333.103(a)(3), above: however, if the files are to be submitted to the DPCO for action, they shall be marked "IMMEDIATE ACTION--PROTEST AFTER **AWARD**".

333.104 Protests to GAO.

(a) General (1) A protestor shall be required to furnish a copy of its complete protest to the contracting officer not later than the first working day after the protest is filed with GAO. Immediately upon receiving a copy of the complete protest, the contracting officer shall telephonically notify the contracting activity's protest control officer, who, in turn, shall immediately notify the DPCO. The contracting officer shall provide the name of the protestor, the solicitation number, the date and time the protest was received from the protester, and any other significant information.

(3) Protests lodged with GAO, whether before or after award, shall be processed by the DPCO. Protest files shall be prepared by the contracting office and distributed as follows: two copies to the DPCO, one copy to the contracting activity's protest control officer, and one copy to **OGC-BAL**. Files shall include the following documentation :

(i) **The** contracting officer's statement of facts and circumstances, including a discussion of the merits of the protest, and conclusions and recommendations, including **documentary** evidence on which they are based.

(ii) A copy of the IFB or RFP.

(iii) A copy of the abstract of bids or proposals.

(iv) A copy of the bid or proposal of the successful offeror to whom award has been made or is proposed to be made.

(v) A copy of the bid or proposal of the protestant, if any.

(vi) The current status of award. When award has been made, this shall include whether performance has commenced, shipment or delivery has been made, or a stop work order has been issued.

(vii) A copy of any mutual agreement to suspend work on a **no-cost** basis, when appropriate (see FAR **33.104(c)(4)**).

(viii) Copies of the notice of protest given offerors and other parties when the notice is appropriate (see FAR 33.104 (a) (4)).

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(ix) A copy of the technical evaluation report required by 315.608-76, when applicable, and a copy of each evaluator's rating for all proposals.

(x) A copy of the negotiation memorandum, when applicable (see 315.672).

(xi) The name and telephone number of the person in the contracting office who may be contacted for information relevant to the protest. and

(xii) Any document which is referred to in the contracting officer's statement of facts.

The file shall be assembled in an orderly manner and shall include an index of enclosures.

(4) The contracting officer is responsible for making the necessary notifications referenced in FAR 33.104(a)(4). Copies of the Views of interested parties submitted in response to the notification shall be immediately provided to the DPCO upon receipt by the contracting officer.

(5) The contracting officer shall furnish the protest file containing the documentation specified in 33.104(a)(3), except item (i), to the DPCO within twelve (12) work days from receipt of the protest. The contracting officer shall provide the documentation required by item (i) of 33.104(a)(3) to the DPCO within nineteen (19) work days from receipt of the protest. (The contracting officer's protest control officer may provide a written opinion and recommendation on the protest to the DPCO within nineteen (19) work days from receipt of the protest by the contracting officer.) The contracting officer shall clearly identify any document or portions of document he or she desires to withhold from the protester, and shall include justification for the withholding of each document or portion of document in the contracting officer's statement of facts. Since the statute allows only a short time period in which to respond to protest lodged with GAO, the contracting officer shall handle each protest on a priority basis.

The DPCO shall prepare the report and submit it and the protest file to GAO in accordance with FAR 33.104(a)(5).

(6)(i) The DPCO shall take the necessary action specified in FAR 33.104(a)(6)(i) after receiving all the documentation required by 33.104(a)(3) from the contracting officer.

(ii) Since the DPCO will furnish the report to GAO, the protestor, and other interested parties, comment on the report from the protestor and other interested parties will be requested to be sent to the DPCO.

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(7) The Office of **Acquisition** and Grant6 Management (**OAGM**) has been designated a6 the headquarters **office**, and the **DPCO** a6 the individual, that GAO should contact concerning all protest6 lodged with GAO.

(b) Protests before award. (1) To make an award notwithstanding a protest, the **contracting** officer shall prepare a finding using the criteria in FAR 33.104(b)(1), have it executed by the principal official responsible for acquisition (PORA), and forward it, along with a written request for approval to make the **award**, to the Director, **OAGM**.

(2) If the request to make an award notwithstanding the protest is approved **by the Director, OAGM**, the DPCO shall notify GAO. **Whether** the request is approved or not, the DPCO shall telephonically notify the contracting activity's protest control officer of the decision of the Director, **OAGM**, and the contracting activity's protest **control officer shall** immediately notify the contracting officer. The DPCO **shall** confirm the decision by memorandum to the contracting activity's protest control officer.

(3) Reserved.

(4) The contracting officer shall prepare the protest file in accordance with 333.104(a)(3), and forward it, in duplicate, to the DPCO (see 333.104(a)(5)). The **file shall be marked** "IMMEDIATE ACTION - PROTEST BEFORE **AWARD**."

(c) Protests after award. (1) Reserved.

(2) If the contracting officer believes performance should be allowed to continue notwithstanding the protest, a finding shall be prepared **by the contracting officer**, executed **by the** PORA, and forwarded, along with a written request **for** approval, to the Director, **OAGM**. The same procedures for notification stated in 333.104(b)(2), above, shall be followed.

(3) - (5) Reserved.

(6) The contracting officer shall prepare the **protest** file in accordance with 333.104(a)(3), and forward it, in duplicate, to the DPCO (see **333.104(a)(5)**). The file shall **be marked** "IMMEDIATE ACTION - PROTEST AFTER AWARD."

(d) Findings and notice. The contracting officer shall perform the actions required by FAR **33.104(d)**; however, notification to GAO shall be **made by** the DPCO.

Protests

(e) and (f) Reserved.

(g) **Notice to GAO.** The Director, Office of Acquisition and Grants Management shall be the official to comply with the **requirements** of FAR 33.104(g).

(h) Reserved.

(i) **Express option.** When GAO invokes the express option, e contracting officer shall prepare the complete protest file as described in 333.104(a)(3), to include item (i), and deliver it (hand-carry, if necessary) to the DPCO no later than the close of business on the ninth work day after the express option is invoked. The contracting officer shall involve OGC-BAL as early as possible after receiving notification of the invocation of the express option, and obtain the concurrence of the cognizant OGC-BAL attorney prior to transmitting the protest file to the DPCO. The DPCO shall prepare the report and submit it and the protest file to GAO.

333.105 Protests to GSBICA.

(a)(1) The contracting officer shall give telephone notification to the DPCO, OGC-BAL, and the contracting activity's protest control officer **immediately** upon notification of the protest.

(2)(i) The contracting officer is responsible for complying with the requirements in FAR **33.105(a)(2)(i)**.

(ii) The cognizant OGC-BAL attorney is responsible for **complying** With the requirement stated in FAR **33.105(a)(2)(ii)**.

(b) As soon as possible but no later than six (6) work days after the filing of the protest, a copy of the protest file **containing all** documents (see FAR 33.105(b), especially (b)(7)), and **labeled** on the cover "**FOR USE BY DPCO ONLY**", shall be in the hands of the DPCO for review. Simultaneously, two copies of the same protest file provided to the DPCO shall be provided to the cognizant OGC-BAL attorney. These two copies **shall be labeled on the cover "FOR USE BY OGC-BAL"**. After consultation with the cognizant OGC-BAL attorney, the DPCO shall transmit the protest file to the GSBICA.

(1) Rather than furnishing a decision, the contracting officer shall include a statement of facts **and circumstances and a discussion** of the merits of the protest, as well as conclusions and recommendations and documentary evidence on which they are based. These statements shall be reviewed by the cognizant OGC-BAL attorney before being finalized.

Protests

(2) - (6) Reserved.

(7) The DPCO shall provide all parties with a list of document6 furnished to GSBGA for in camera review.

(8) and (9) Reserved.

(10) The copies of the protest files to be provided to the DPCO and OGC-BAL shall also contain the document6 or information specified in 333.104(a)(3)(vii) through (xii). The files shall be assembled in an orderly manner and include an index of enclosures.

(c) The cognizant OGC-BAL attorney is responsible for complying with the requirement stated in FAR 33.105(c).

(d) (1) If the protest requests a suspension of acquisition authority, the contracting officer must make this known to the DPCO, OGC-BAL, and the contracting activity's protest control officer at the time of the initial telephone notification of the filing of the protest to afford an opportunity for the DPCO, OGC-BAL, principal official responsible for acquisition (PORA), and contracting officer to take appropriate action.

(2) If it can be established that the conditions stated in FAR 33.105(d)(1)(i) and (ii) are present, the contracting officer shall prepare a D&F setting forth the circumstances. The D&F shall be concurred in by the cognizant OGC-BAL attorney before being executed by the PORA (not delegable).

(e) and (f) Reserved.

(g) If an appeal is to be made by the Department regarding a final decision by the GSBGA, it shall be made by OGC-BAL.

333.106 Solicitation provision and contract clause.

(a) The provision at FAR 52.233-2, Service of Protest, shall be completed by entering the name and complete mailing address of the contracting officer.

(b) Reserved.

Subpart 333.2

Disputes and Appeals

333.203 Applicability.

(a) and (b) Reserved.

(c) The Armed **Services** Board of Contract Appeals (ASBCA) has been designated by the Secretary as the authorized "**Board**" to hear and determine disputes for the Department.

333.209 Suspected fraudulent claims.

The contracting officer shall submit any instance of a contractor's suspected fraudulent claim to the Office of the Inspector General for investigation.

333.210 Contracting officer's authority.

The contracting officer shall refer a proposed final decision to the Office of General Counsel, Business and Administrative Law Division (OGC-BAL), **or** the Regional Attorney in the **HHS** regional office servicing the region in which the contracting officer **is** located, for advice as to the legal sufficiency and format before sending the final decision to the contractor. The contracting officer shall provide OGC-BAL or the Regional Attorney with the pertinent documents with the submission of each proposed final decision.

333.211 Contracting officer's decision.

(a) (1) Reserved

(a) (2) See 333.210.

(a) (3) - (a) (4) (iv) Reserved

(a)(4)(v) when using the paragraph in FAR 33.211 (a)(4)(v), the contracting officer shall insert the words "Armed Services" before each mention of the term "Board of Contract Appeals".

(b)-(c) (1) Reserved

(c) (2) The contracting officer does not have jurisdiction to consider a claim from the contractor over \$50,000, unless that claim has been certified.

Disputes and Appeals

(d) • (g) Reserved

(h) At any time within the period of appeal, the contracting officer may modify or withdraw his/her final decision. If an appeal from the final decision has been taken to the ASBCA, the contracting officer will forward his/her recommended action to CGC-BAL or the cognizant Regional Attorney with the supplement to the contract file which supports the recommended correction or **amendment**.

333.212 Contracting officer's duties upon appeal.

(a) Appeals shall be **governed** by the rules set forth in the **"Rules of the Armed Services Board of Contract Appeals"**, or by the rules established by the U.S. Claims Court, as appropriate.

(b) CGC-BAL or the **cognizant** Regional Attorney is **designated** as the Government Trial Attorney to represent the Government in the **defense** of appeals before the ASBCA. A decision by the ASBCA **will** be transmitted by the Government Trial Attorney to the appropriate contracting officer **for** compliance in accordance with the **ASBCA's** decision.

(c) If an appeal is filed with the ASBCA, the contracting officer shall assemble a file within 30 days of receipt of an **appeal**, or advice that an appeal has **been** filed, that consists of all documents pertinent to the appeal, including:

(1) The decision and findings of fact from which the appeal is taken:

(2) The contract, including specifications and pertinent modifications, plans and drawings;

(3) All correspondence between the parties pertinent to the **appeal**, including the letter or letters of claim in response to which the decision was issued:

(4) Transcripts of any testimony taken during the course of proceedings, and affidavits or statements of any witnesses on the matter in dispute made prior to the filing of the notice of appeal with the Board: and

Disputes and Appeals

(5) Any additional information considered pertinent.

The **contracting** officer shall furnish the appeal file to the Government Trial Attorney for review and approval. After approval, the contracting officer shall prepare four copies of the file, one for the ASBCA, one ~~for~~ for the appellant, one for the ~~Government Trial Attorney~~, and one ~~for the~~ for the contracting office.

(d) At all times after the filing of an appeal, the contracting officer shall render whatever assistance is requested by the Government Trial Attorney. When an appeal is set for hearing, the concerned contracting officer, acting under the guidance of the Government Trial Attorney, shall be responsible for arranging for the presence of Government witnesses and specified physical and documentary evidence at both the pre-hearing conference and the hearing.

(e) If a contractor which has filed an appeal with the ASBCA elects to accept fully the decision from which the appeal was taken, or any modification to it, and gives written notification of acceptance to the Government Trial Attorney or the concerned contracting officer, the Government Trial Attorney will notify the ASBCA of the disposition of the dispute in accordance with Rule 27 of the ASBCA.

(f) If the contractor has elected to appeal to the U.S. Claims Court, the U.S. **Department** of Justice will represent the Department. However, the contracting officer shall still coordinate all actions through OGC-BAL.

333.212-70 Formats.

(a) The following format is suggested for use in transmitting appeal files to the ASBCA:

Your reference: _____

(Docket No.)

(Name)

Recorder, Armed Services Board
of Contract Appeals
Skyline Six
5109 **Leesburg** Pike
Falls Church, Virginia 22041

Disputes and Appeals

Dear (Name):

Transmitted herewith are documents relative to the appeal under Contract No. _____ with the (name of contractor) in accordance with the procedures under Rule 4.

The Government Trial Attorney for **this** case is (Insert and Administrative Business ive Law, Office of General Counsel, Department of Health and Human Services, 330 Independence Avenue, S.W., Washington, D.C. 20201. or Regional Attorney and office address, as appropriate).

The request for payment of charges resulting from the processing of this appeal **should** be addressed to:

(Insert name and address of cognizant finance office.)

Sincerely yours,

Contracting Officer

.Enclosures

(b) The following format is suggested for use in notifying the appellant that the appeal file was submitted to the **ASBCA**:

(Contractor **Address**)

Dear _____:

An appeal **file** has been compiled relative to the appeal under Contract No. _____.

Disputes and Appeals

and has been submitted to the Armed Services Board of Contract Appeals (ASBCA). The enclosed duplicate of the appeal file is identical to that submitted to the Board, except that contract documents which you already have may have been excluded.

You may furnish or suggest any additional information deemed pertinent to the appeal to the Armed Services Board of Contract Appeals according to their rules.

The ASBCA will provide you with further information concerning this appeal.

Sincerely yours,

Contracting Officer

Enclosure

333.213 Obligation to continue performance.

(a) The Disputes clause at FAR 52.233-1 shall be used without the use of Alternate I. However, if the contracting officer determines that the Government's interest would be better served by use of paragraph (h) in Alternate I, he/she must request approval for its use from the Director, Division of Acquisition Policy (through normal acquisition channels).

(b) Reserved.

333.214 Contract clause.

The clause at FAR 52.233-1 shall be used in all circumstances, except as indicated in 333.213.

Part 334

Major System Acquisition

Section

334.003

Agency head responsibilities.

Part 334

Major System Acquisition

334.003 Agency head responsibilities.

The Department's implementation of **OMB** Circular No. A-109 may be found in Chapter 1-150 of the General Administration Manual.

Part 335

Research and Development Contracting

Section

335.070	Cost-sharing.
335.070-1	Policy.
335.070-2	Amount of cost-sharing.
335.070-3	Method of cost-sharing.
335.070-4	Institutional cost-sharing agreements,
335.070-S	Contract clauses.
335.070-6	Contract award.

Part 335

Research and Development Contracting

335.070 Cost-sharing.

335.070-I Policy.

(a) In addition to utilizing cost-sharing type contracts when required **by** statute, the desirability of utilizing this type of contract, when authorized, should also **be** considered under certain circumstances when not required by statute. Contractors should **be** encouraged to contribute to the **cost of** performing research where there is a probability that the contractor will receive present or future benefits from participation, such as, increased technical know-how, training to employees, acquisition of equipment, **use of background knowledge** in future contracts, etc. Cost-sharing is intended to serve the mutual interest of the Government and **the performing organization by helping to** assure efficient utilization of the resources available for the **conduct of research projects and by promoting sound planning and prudent fiscal policies by the performing organization.** If **cost-sharing** is not required by statute, encouragement should be given to organizations to contribute to the cost of performing research under research contracts unless the contracting officer determines that a request for cost-sharing would not be appropriate **because of** the following circumstances:

(1) The particular research objective or scope of effort for the project is specified **by** the Government **rather** than proposed by the performing organization. This would usually include any formal Government requests for proposals for a specific project.

(2) The research effort has only **minor** relevance to the **non-Federal** activities of the performing organization, and the organization is proposing to undertake the research primarily as a service to the Government.

(3) The organization has little or no non-Federal sources or funds from which to make a cost contribution. Cost-sharing should **generally** not be requested if cost-sharing would require the Government to provide funds through some other means (such as fees) to **enable the organization** to cost-share. **It** should be recognized that those organizations which are predominantly engaged in research and development and have little or no

Research and Development Contracting

production or other service activities may not be in a favorable position to make a cost contribution.

(b) Cost-sharing may be negotiated in either of two ways. When **cost-sharing** is negotiated on a contract by contract basis, the responsibility for negotiating the cost-sharing arrangement is that of the contracting officer. In the case of institutional cost-sharing arrangements (see 335.070-4), the responsibility for negotiating cost-sharing is that of the Office of the Assistant Secretary for Health. Each research contract file should show whether the contracting officer considered cost-sharing appropriate for that particular contract and, except when an institutional cost-sharing agreement is applicable, in what amount. If cost-sharing was not considered appropriate) the file must indicate the factual basis for that decision, e.g., "**Because** the contractor will derive no benefits from this award that can be applied to its commercial activities, cost-sharing is **not** considered appropriate." The contracting officer may wish to coordinate with the project officer before documenting this decision.

(c) If the contracting officer considers cost-sharing to be appropriate for a research contract and the contractor **refuses** to accept this type of contract, the award may be made without cost-sharing, except when cost-sharing is required by statute, if the contracting **officer** concludes that payment **of** the full cost of the research effort is necessary in order **to** obtain the services of that particular contractor.

335.070-2 Amount of cost-sharing.

When cost-sharing is required by statute or determined to be appropriate, the following guidelines shall be utilized in determining the amount of **cost** participation by the contractor, **except** where an institutional cost-sharing agreement is applicable:

(a) Cost participation by educational institutions and other not-for-profit or nonprofit organizations should **normally** be **at** least 1 percent of the total project cost. In many cases, cost-sharing of less than 5 percent **of** the total project cost would be **appropriate** in view of the organizations' nonprofit status and their normally limited ability to recover the cost of such participation from non-Federal sources.

Research and Development Contracting

However, in some cases, it **may be** appropriate for educational institutions to provide a higher degree of cost-sharing, such as when the cost of the research consists primarily of the academic year salary of faculty members (or when the equipment acquired by the institution for the project will **be** of significant **value to** the institution in its educational activities). The percentages stated above are not intended as a substitution for those set forth in **any** legislation and are not to **be** used in lieu **of** those contained in that legislation.

(b) The amount of cost participation by commercial or industrial organizations should depend to a large extent **on** whether the research effort or **results** are likely to enhance the performing organization's capability, expertise, or competitive position, and the value of such enhancement to the performing organization. It should **be** recognized that those organizations which are predominantly engaged in research and development and have little or no production or other service activities may not be in a favorable position to derive a **monetary** benefit from their research under Federal agreements. Therefore, cost participation **by** commercial or industrial **organizations** could reasonably range from as little as 1 percent or less of the total project cost, to **more** than 50 percent of the total project cost.

(c) If **the** performing organization will not acquire title to or the right to use inventions, patents, or technical information resulting from the research project, it would generally be appropriate to obtain less cost-sharing than in cases in which the performer acquires such rights.

(d) When cost-sharing is required **by** statute, cost participation of less than 1 percent may **be** appropriate if consistent with the provisions of the statute, and:

- (1) A formal request for proposal is issued;
 - (2) The contractor proposes to perform the research primarily as a service to the Government: or
 - (3) The contractor has little or no non-Federal sources of funds from which to make a cost contribution.
- (e) A fee or profit will usually not **be** paid to the **per-**

Research and Development Contracting

forming organization if the organization is to contribute to the cost of the research effort, but the amount of cost-sharing may be reduced to reflect the fact that the organization is foregoing its normal fee or profit in the research. However, if the research is expected to be of only minor value to the performing organization and if cost-sharing is not required by statute, it may be appropriate for the performer to make a contribution in the form of a reduced fee.-or profit rather than sharing the costs of the project.

(f) The organization's participation may be considered over the total term of the project so that a relatively high contribution in one year may be offset by a relatively low contribution in another.

(g) A relatively low degree of cost-sharing may be appropriate if, in the view of the operating divisions or their subordinate elements, an area of research requires special stimulus in the national interest.

(h) In the final analysis, the amount of cost participation should reflect the mutual agreement of the parties, provided that it is consistent with any statutory requirements.

335.070-3 Method of cost-sharing.

Cost-sharing on individual contracts may be accomplished either by a contribution of part or all of one or more elements of allowable cost of the work being performed, or by a fixed amount or stated percentage of the total allowable costs of the project. Costs so contributed may not be charged to the Government under any other grant or contract (including allocations to other grants or contracts as part of any independent research and development program).

335.070-4 Institutional cost-sharing agreements.

(a) An institutional cost-sharing agreement covers the aggregate of some or all of the research projects supported by HHS research contracts and grants at a given performing organization. With respect to contracts, these agreements will apply only to cost-sharing type contracts resulting from unsolicited proposals and awarded without fee or profit. Eligibility for institutional cost-sharing agreements is limited to nonprofit

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institutions of higher education and other public or private nonprofit or not-for-profit organizations. Usually, a single agreement will cover all applicable research projects at a given performing organization; however, in unusual cases, separate agreements for individual departments or locations of the performing organization may be negotiated if deemed advantageous.

(b) The institutional cost-sharing agreements establish an overall sharing ratio applicable to the aggregate of all covered projects. Individual awards will incorporate the institutional agreement by reference, but will not establish a specific sharing ratio for the individual project. The amount of sharing on any particular project will therefore be left to the discretion of the performing organization, and relatively high contributions **on** some projects may offset relatively low contributions on other projects, provided that the agreed aggregate contribution is made during each **of** the contractor's fiscal **years, and a contribution,** even if nominal, is made to each covered project.

(c) The Public Health Service shall be responsible for negotiating all **HHS** institutional cost-sharing agreements. Agreements, when negotiated, will be binding upon all **HHS** activities. Eligible contractors wishing to negotiate institutional cost-sharing agreements should contact the Division of Grants and Contracts, Office of Resource Management, Public Health Service, Room 18 A 19, **Parklawn** Building, 5600 Fishers Lane, Rockville, Maryland 20857.

(1) All necessary implementing instructions to cover matters such as content **of** proposals, format of agreements, documentation, etc. shall be issued by the Public Health Service, subject to the prior approval of the Office of Acquisition and Grants Management.

(2) The Public Health Service shall provide the Office of Acquisition and Grants Management and the Department's operating divisions with current listings **of** all institutional cost-sharing agreements, indicating the date on which they become effective with respect to contracts. Copies **of** individual agreements will be made available to the Department's **other** activities upon request. Each activity shall designate only one individual who shall be authorized to make such **requests.**

Research and Development Contracting

(d) The amount of cost-sharing negotiated under an institutional cost-sharing agreement will be determined in accordance with the appropriate guidelines contained in "A Guide to Institutional Cost Sharing Agreements" issued by the Office of Resource Management, PHS. The extent to which the performing organization shared in the costs of **HHS-sponsored** research in the **past**, and its anticipated ability to do so in the future, should also be taken into account.

335.070-5 Contract clauses.

Clauses for cost sharing in individually negotiated contracts or under institutional agreements are set forth in 352.232-71.

335.070-6 Contract award.

In consonance with the Department's objectives of competition and support of the small business program, award of contracts should not be made solely on the basis of ability or willingness to cost-share. Awards should be made primarily on the contractors's competence and only after adequate competition has been obtained among large and small business organizations whenever possible. The offeror's willingness to share costs should not be considered in the technical evaluation process but as a business consideration, which is secondary to selecting the best qualified source.

Part 337

Service Contracting

Subpart 337.1 - Service Contracts - General

Section

337.101	Definitions.
337.103	Contracting officer responsibility.
337.104	Personal services contracts.
337.109	Services of quasi-military armed forces.

Subpart 337.2 - Consulting Services

337.204	Policy.
337.270	Consulting services reporting.

Subpart 337.1

Service Contracts - General

337.101 Definitions.

"Service contract." A contract may require the furnishing of both property and services, such as a research and development contract which requires a final report. In a case such as this, this subpart **will** apply to the extent that the furnishing of services is involved. Other examples of service contracts include training and education, surveys and data collection, data processing, medical services, and stenographic services.

337.103 Contracting officer responsibility.

(a) Reserved.

(b) Contract actions for the services of experts and consultants are also exempt from the **requirements of** FAR 37.103(a)(3); they are to be certified in accordance with the provisions in General Administration Manual Chapter 8-15.

(c) For negotiated acquisitions, the determination shall be included as a statement in the negotiation memorandum. For sealed bid acquisitions, the determination shall be included as a separate statement in the contract file.

(d) In most cases, gathering the information and data on which to base the determination should be a joint effort between contracting and program personnel. The contracting officer shall request the advice of the Office of General Counsel and/or the personnel office before processing any request to acquire services if there is doubt as to whether an employer-employee relationship would be involved in performance of the contract.

337.104 Personal services contracts.

(a) As indicated in FAR 37.104, the paramount consideration in determining if an **employer-employee** relationship exists is the presence of direction or supervision by Government personnel of contractor employees, as a **result** of either the inherent nature of the service or the manner in which the service is provided. A personal service relationship exists if this direction or supervision is necessary to:

Service Contracts • General

(I) Adequately protect the Government's **interest**;

(2) Retain control of the function involved; and/or

(3) Retain full personal responsibility by a duly authorized Federal officer or employee for the **function supported**.

(b) Reserved.

(c) (1) Reserved.

(2) The degree of supervision necessary to establish an **employer-employee relationship** is relatively continuous, close supervision. Sporadic supervision is not sufficient to constitute an employer-employee relationship. (In determining whether the Government rather than the contractor exercises "relatively continuous, close supervision" of contractor personnel, the fact that an engineer, for **example**, may require less supervision and may exercise more independence of judgment than a food service worker is not itself determinative. If the Government takes over that degree of supervision that the contractor would otherwise exercise over either individual, the relationship created between the Government and either individual is tantamount to that of employer and employee.)

(d) The likelihood of the existence of an employer-employee relationship increases as the number and extent of the elements in FAR 37.104(d) increases. However, the mere existence of these elements does not constitute an employer-employee relationship unless continuous, **close** supervision exists. In determining the presence of the referenced elements, relevant factors including the following shall be considered:

(1) The nature of the work.

(i) If the Government can use Federal personnel to perform the required work, or if the Government has rights to the specialized knowledge or equipment which is needed to **perform** the work;

(ii) Whether the services represent the discharge of a Government function which calls for the exercise of personal judgment and discretion on behalf of the Government (This factor, if present in sufficient degree, may alone render the service personal in nature.); and/or

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(iii) If the services are to be a one-time occurrence (or a continuing requirement of short term duration).

(2) Contractual provisions concerning the contractor's employees.

(i) To what extent the Government specifies the qualifications of, or has the right to approve, individual contractor employees (other than the Government's right to approve or disapprove new **key** personnel, remove key personnel, grant or deny **security** clearances, and provide for necessary health qualifications.) (Also, it is permissible for the Government to specify the technical and experience qualifications of contractor employees, if this is necessary to assure satisfactory performance.);

(ii) To what extent the Government can assign tasks to, and prepare work schedules for, contractor employees **during** performance of the contract. (This does not preclude inclusion in the **contract** of work schedules for the contractor - but not **individual** employees - or the establishment of a time **of** performance **for** orders issued under a requirements or other indefinite delivery-type contract.);

(iii) To what extent the Government can supervise or control the method in which the contractor performs the service, the number of people that will be employed, the specific duties of individual employees, and similar details. (However, it is permissible to require that contractor employees comply with regulations for the protection of life and property. Also, it is permissible to recommend a specific number of people the contractor may employ, if this is necessary to assure performance: but in that event, the contract must specify that this does not in any way minimize the contractor's obligation to use as many employees as are necessary for proper contract performance.);

(iv) If the Government can review performance of each individual contractor employee (as opposed to reviewing the final product after completion of the **work**); and/or

(v) If the Government has the right to have contractor employees removed from the **job** for reasons other than misconduct or security.

Service Contracts - General

(3) Other provisions of the contract.

(i) Whether the contractor undertakes a specific task or project that is definable either at the inception of the contract or at some point during performance, or whether the **work is** defined on a day-to-day basis. (However, this does not preclude use of a requirements or other indefinite delivery-type contract, provided the nature of the **work is** specifically described in the contract, and orders are formally issued to the contractor rather than to individual employees.);

(ii) Whether payment will **be** for results accomplished or solely according to time worked. (This is a factor which might **be** useful in a doubtful case, but should not in itself create doubt about services which are otherwise **clearly** nonpersonal.); and/or

(iii) Whether Government office or working space, facilities, equipment, and supplies will be used for contract performance. (This is a factor which might be useful in a doubtful case, but should not in itself create doubt about services which are otherwise clearly nonpersonal.).

(4) Administration of the contract.

(i) If contractor employees are used interchangeably with Government personnel; and/or

(ii) If contractor employees are integrated into the **Government's** organizational structure.

(e) and (f) Reserved.

(g) The following are examples of personal and nonpersonal services, but are illustrative only and are not to be used as the basis for determination in any specific case.

(1) The following are examples of personal services contracts:

(i) A contract to furnish ordinary, day-to-day, stenographic and secretarial services in a Government office under direct Government supervision.

(ii) A contract for **the** testing of a **substance** where the

Service Contracts • General

project officer visits the contractor's facility several times each week to consult with the principal investigator, review data, specify methods of quality control, specify testing to be done, and provide instruction to investigators.

(iii) A contract for the performance of **a** function which management must perform in order to retain essential control over the conduct of agency programs (e.g., negotiating contract amounts).

(2) The following are examples of nonpersonal services contracts:

(i) A contract for technical assistance work requiring specialized equipment and trained personnel unavailable to the Government. The contractor performs work described in the contract free of Government supervision, and does not act on behalf of the Government.

(ii) A contract with an individual for delivery of lectures without Government supervision (even if they are to be given on specific **dates**, or on specialized subjects, or if payment will be by the hour).

(iii) A fixed price **contract** for janitorial services which provides **for** specific tasks to be performed in specific places, free of Government direction, supervision, and control over the contractor's employees.

(iv) A research and development contract providing for a level of effort which will **be** performed by the contractor independent of Government direction, supervision, and control.

337.109 Services of quasi-military armed forces.

As distinguished in FAR 37.109, solicitations for protective services shall include the following certification:

"The bidder/offeror certifies it is not **a** detective agency, nor an employee of such agency as contemplated by 5 U.S.C. 3108."

Subpart 337.2

Consulting Services

337.204 Policy.

General Administration Manual Chapter 8-15 prescribes policies and procedures concerning approvals required before contracting for expert or consulting services.

(a) - (d) Reserved.

(e) Services of experts or consultants may be acquired by contract only when:

(1) The services will be nonpersonal in nature, are critical to the planning, development, operation, or evaluation of a Department program, cannot be accomplished by Government employees, and are economically available from the private sector; or

(2) The performance of the work by a consultant is directed by statute.

337.270 Consulting services reporting.

The clause set forth in 352.237-70 shall be included in every contract for expert or consulting services.

HHS Part 339 - Management, Acquisition, and
Use of Information Resources
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Part 339

Management, Acquisition, and
Use of Information Resources

Subpart 339.70 - ADP Clearances and Systems
Security

Section

339.7001

ADP clearances.

339.7002

ADP systems security.

Subpart 339.70

ADP Clearances and Systems Security

339.7001 ADP clearances.

In accordance with Chapter 4-10 of the HHS Information Resources Management (IRM) Manual, the Office of Information Resources Management (OIRM), OASMB-OS, is responsible for the review and approval of all requests for proposed automatic data processing (ADP) systems and modifications to existing ADP systems which require the acquisition of ADP hardware, software packages, and services, and telecommunications equipment, which exceed the dollar thresholds stated in Chapter 4-10.

(a) It is the responsibility of the program office to obtain written approval from **OIRM** on proposed ADP acquisitions which exceed the thresholds stated in Exhibit 4-10-A of Chapter 4-10 prior to submitting the request for contract to the contracting activity.

(b) The OIRM approval document (delegation of procurement authority (DPA)) is to be attached to the request for contract when it is submitted by the program office to the contracting activity. The contracting activity shall not issue a solicitation based on the request for contract until a properly executed approval document (DPA) is obtained.

339.7002 ADP systems security.

(a) **Program responsibilities.** Whenever a proposed contract action requires the design, development, maintenance, or use of an ADP system or the use of ADP resources, the program office is required to designate a responsible individual to serve as the ADP system manager who is to ensure, in coordination with the cognizant systems security officer, that ADP security requirements are met and that each contractor maintains an acceptable security program. The project officer is responsible for setting forth the specific portions of Part 6, ADP Systems Security, of the HHS IRM Manual which are applicable to the instant acquisition.

(b) **Contracting responsibilities.**

(1) The contracting officer is responsible for ensuring that a certification of ADP systems security requirements, signed by both the ADP system manager and the ADP systems security officer, is submitted with the request for contract. The contracting officer shall not initiate action on the request for contract

ADP Clearances and Systems Security

until the properly executed certification is received. The certification will state that the security requirements specified are reasonably sufficient for the intended application and that they comply with current Federal and HHS computer security policies, procedures, standards, and guidelines.

(2) When developing the request for proposals, the contracting officer shall include in the technical proposal instructions a statement requiring that the offeror present a detailed outline of its proposed ADP system security program which complies with the requirements of the statement of work and applicable portions of Part 6, ADP Systems Security, of the HHS IRM Manual.

(3) The contracting officer shall include a special provision reading substantially as follows in all applicable solicitations and resultant contracts:

The Contractor agrees to comply with the ADP system security requirements set forth in the statement of work **and applicable portions** of Part 6, ADP Systems Security, of the HHS IRM Manual. The Contractor further agrees to include this provision in any subcontract **awarded pursuant to this** prime contract.

(4) The contracting officer **shall ensure that a properly** executed certification confirming that the offerors comply with the **necessary** security requirements is attached to the technical evaluation report received from the evaluation panel before proceeding with the acquisition process. This certification must be countersigned by the officials designated in paragraph (1) above and must contain a similar statement of compliance.

Part 342

Contract Administration

Subpart 342.5 • Postaward Orientation

Section
342.504

Postaward letters.

Subpart 342.7 • Indirect Cost Rates

342.705

Final indirect cost rates.

Subpart 342.70 • Contract Monitoring

342.7001

Purpose.

342.7002

Contract monitoring responsibilities.

342.7003

Withholding of contract payments.

342.7003-1

Policy.

342.7003-2

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Postaward Orientation

342.504 Postaward letters.

To the extent practicable, contracting officers should use letters to accomplish postaward orientation objectives. A postaward orientation conference should only be arranged when letters cannot resolve key issues.

Subpart 342.7

Indirect Cost Rates

342.705 Final indirect **cost** rates.

The Director, Division of Cost Allocation of the Regional Administrative support Center within each HHS regional office has been delegated the authority to establish indirect cost rates, research patient- **care rates**, and, as necessary, fringe benefit, computer, and other special costing rates for use in contracts and grants awarded to State and **local** governments, colleges and universities, hospitals, and other nonprofit **organizations**.

Subpart 342.70

Contract Monitoring

342.7001 Purpose.

Contract monitoring is an essential element of contract administration and the acquisition process. This subpart describes the Department's operating concepts regarding contract monitoring, performed jointly by the project officer and the contracting officer, to **ensure** that the required monitoring is performed, timely remedial action **is** taken when necessary, and a determination is made that contract objectives have been met.

342.7002 Contract monitoring responsibilities.

(a) Upon execution of the contract, the mutual obligations of the Government and the contractor are established by, and limited to, the written stipulations in the contract. Unless authorized by the contracting officer, HHS personnel shall not direct or **request the contractor** to assume any obligation or take any actions not specifically required by the **contract**. Only the contracting officer may impose a requirement which will result in a change to the contract. All contract changes must be directed in writing or confirmed in writing by the contracting officer.

(b) The contracting officer is responsible for assuring compliance with **all** terms of the contract, **especially the** statutory, **legal**, business, and regulatory provisions. Whether or not a postaward conference is held, the contracting officer shall inform the **contractor by letter (if not already stipulated by contract provisions)** of the authorities and responsibilities of the Government personnel with whom the **contractor will be dealing throughout** the life of the contract.

(c) The contracting officer must **depend** on program, technical, and other personnel **for assistance and advice** in monitoring the contractor's performance, and in other **areas of postaward administration**. The contracting officer must **assure that responsibilities assigned** to these personnel are understood and **carried out**. The individual **roles and** corresponding responsibilities typically involve, but are not limited to, the following:

(1) The role of **program and technical** personnel in monitoring the contract to assist or **advise** the **contracting officer** (or act as his/her representative when so designated by the

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contracting officer) in activities such as:

(i) Providing technical monitoring during contract performance, and issuing letters to the contractor and contracting officer relating to delivery, acceptance, or rejection in accordance with the terms of the contract:

(ii) Assessing contractor performance, including inspection and **testing** of products and evaluation of reports and data;

(iii) Recommending **necessary** changes to the schedule of work and period of performance in **order** to accomplish the **objectives** of the contract. This shall be accomplished by a written request to the contracting officer, together with an appropriate justification and funds availability citation:

(iv) Reviewing invoices/vouchers and recommending approval/disapproval action **by** the contracting officer, to include **.** comments regarding anything unusual discovered in the **review**;

(v) Reviewing and recommending approval or disapproval of subcontracts, overtime, travel, and key personnel changes: and

(vi) Participating, as necessary, in various phases of the contract closeout process.

(2) The role of the project officer in performing required aspects of the contract monitoring process. In addition to those applicable activities set forth in (c)(1) **above**, the project officer shall:

(i) Submit periodic reports to the contracting officer that concisely explain the **status of** the contract, and include recommended actions for any **problems** reported. Provide the contracting officer with **written notification of evaluation** and approval/disapproval of contract deliverables and of completion of tasks or phases. The contracting officer will, in turn, provide the contractor with written notification of approval or disapproval unless the responsibility has been delegated by the contracting officer, in which **case** the person responsible for such action will notify the contractor and provide a copy to the contracting officer for inclusion in the contract file:

(ii) Monitor the technical aspects of the contractor's

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business and technical progress, identify existing and potential problems that threaten performance, and immediately inform the contracting officer of deviations from contract objectives, or from any technical or delivery requirements, so that remedial measures may be instituted accordingly;

(iii) Provide immediate notification to the head of the program office responsible for the program whenever it is determined that program objectives are not being met, together with specific recommendations of action to be taken. A copy of the project officer's report and recommendations shall be transmitted to the contracting officer for appropriate action:

(iv) Submit, within 120 days after contract completion, a final assessment report to the contracting officer. The report should include an analysis of the contractor's performance, including the contract and program objectives achieved and missed. A copy of the final assessment report shall be forwarded to the head of the program office responsible for the program for management review and followup, as necessary; and

(v) Accompany and/or provide, when requested, technical Support to the **HHS** auditor in the conduct of floor checks.

(3) The role of the contract administrator, auditor, cost analyst, and property administrator in assisting or advising the contracting officer in postaward administration activities such as:

(i) Evaluation of contractor systems and procedures, to include accounting policies and procedures, purchasing policies and practices, property accounting and control, wage and salary plans and rate structures, personnel policies and practices, etc.:

(ii) Processing of disputes under the Disputes clause and any resultant appeals:

(iii) Modification or termination of the contract: and

(iv) Determination of the allowability of cost charges to incentive or cost reimbursement type contracts and progress payments under fixed-price contracts. This is especially important when award is made to new organizations or those with financial weaknesses.

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(d) The contracting officer is responsible for assuring that contractor performance and contract monitoring are carried out in conformance with contract provisions. If performance is not satisfactory or if problems are anticipated, it is essential that the contracting officer take immediate action to protect the Government's rights under the contract. The contracting officer shall notify his/her immediate supervisor of problems that cannot be resolved within contract limitations and whenever contract or program objectives are not met. The notification shall include a statement of action being taken by the contracting officer.

(e) Contract cost and manpower reporting shall be required on all cost-reimbursement type contracts financed under letter of credit or Departmental Federal Assistance Financing System (DFAFS) methods of payment regardless of dollar value, and on all other cost-reimbursement type contracts of \$100,000 or more. Financial reporting may be required on cost-reimbursement contracts under \$100,000, when financed by other than the letter of credit or DFAFS methods, but only if it is necessary for effective contract administration. Financial and manpower information may be submitted either as a separate contract financial report or as an addendum to a public voucher, as prescribed by the contracting officer. Frequency, format (including instructions), extent, structure (including cost elements and labor categories), and distribution of reporting fall within the discretion of the contracting officer. The contracting officer shall set forth financial reporting requirements in all applicable RFPs and contracts, shall limit the requirements to those necessary for effectual cost and manpower management of the contract, and shall avoid the use of reporting requirements that are unduly burdensome on the contractor.

342.7003. Withholding of contract payments.

342.7003-1 Policy

(a) All solicitations and resultant contracts shall contain a withholding of contract payments clause and an excusable delays clause or a clause which incorporates the definition of excusable delays. These clauses are contained in the Department's contract general clauses.

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(b) The transmittal letter used to convey the contract to each contractor shall contain a notice which highlights the contractor's agreement with the withholding of contract payments clause.

(c) No contract payment shall be made when any report required to be submitted by the contractor is overdue, or the contractor fails to perform or deliver work or services as required by the contract.

(d) The contracting officer shall issue a ten-day cure notice or initiate appropriate termination action for any failure in the contractor's performance as stated in the preceding paragraph (c).

342.7003-2 Procedures.

(a) The contracting officer is responsible for initiating immediate action to protect the Government's rights whenever the contractor fails to comply with either the delivery or reporting provisions of the contract. Compliance with the reporting provisions includes those reports to be submitted directly to the payment office. If such a report is not submitted on time, the contracting officer is to be notified promptly by the payment office.

(b) When the contract contains a termination for default clause, the contractor's failure to either submit any required report when due or perform or deliver services or work when required by the contract is to be considered a default in performance. In either circumstance, the contracting officer is to immediately issue a formal ten-day cure notice pursuant to the default clause. The cure notice is to follow the format prescribed in FAR 49.607 and is to include a statement to the effect that contract payments will be withheld if the default is not cured or is not determined to be excusable.

(1) If the default is cured or is determined to be excusable, the contracting officer is not to initiate the withholding action.

(2) If the default is not determined to be excusable or a response is not received within the allotted time, the contracting officer is to initiate withholding action on all contract payments and is to determine whether termination for default or other action would be in the best interest of the Government.

(C) When the contract does not contain a termination for

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default clause, the contractor's failure to either submit any required report when due or perform or deliver services or work when required by the contract is to be considered a failure to perform. In either circumstance, the contracting officer is to immediately issue a written notice to the contractor specifying the failure and providing a period of ten days, or a longer period as determined necessary by the contracting officer, in which the contractor is to cure the failure or establish an excusable delay. The contracting officer is to include a statement in the written notice to the effect that contract payments will be withheld if the failure is not cured or is not determined to be excusable.

(1) If the failure is cured or is determined to be excusable, the contracting officer is not to initiate the withholding action.

(2) If the failure is not determined to be excusable or a response is not received within the allotted time, the contracting officer is to initiate withholding action on all contract payments and is to determine whether termination for convenience or other action would be in the best interest of the Government.

(d) The contracting officer should consult FAR Subpart 49.4 for further guidance before taking any of the actions described in this section.

342.7003-3 Withholding payments.

(a) When making the determination that contract payments should **be** withheld in accordance with the Withholding of Contract Payments clause, the contracting officer is to immediately notify the servicing finance office in writing of the determination to suspend payments. The notice of suspension is to contain all elements of information required by the payment office to properly identify the contract and the applicable accounts involved.

(b) The contracting officer is to immediately notify the contractor in writing that payments have been suspended until the default or failure is cured.

(c) When the contractor cures the default or failure, the contracting officer is to immediately notify, in writing, all recipients of the notice of suspension that the suspension is to be lifted and contract payments are to be resumed.

(d) When exercising actions regarding the withholding of payment ~~procedures~~, **the** contracting officer must be careful not to ~~waive~~ any ~~of~~ the ~~Government's~~ rights when corresponding with the ~~contractor~~ or when ~~taking~~ any other actions.

Subpart 342.71

Administrative Actions for Cost Overruns

342.7100 Scope of subpart.

This subpart sets forth the procedures to be followed when a cost overrun is anticipated; i.e., the allowable actual cost of performing a cost-reimbursement type contract is expected to exceed the total estimated cost specified in the contract.

342.7101 Applicability.

This subpart applies to the administration of **cost-** reimbursement type contracts and the cost-reimbursement **por-** tion of other types of contracts. Nothing in this subpart shall be construed to relieve contractors from compliance with the Limitation of Cost clause **or** any other provisions of contracts.

342.7102 General.

Reimbursement for costs incurred under cost-reimbursement contracts shall not exceed the amount of funds obligated by the contract, unless increased by the contracting officer. cost overruns shall be held to an absolute minimum, compatible with accomplishment of the statement of work.

342.7103 Contract administration.

342.7103-1 General.

Upon receipt of information that a contractor's accumulated cost and-projected expenditures will exceed the limit of funds obligated by the contract, the contracting officer shall coordinate immediately with the appropriate program office to determine whether the contract should be modified or terminated. If the contracting officer receives information from a source other than the contractor that a cost overrun is anticipated, the contracting officer shall verify the information with the contractor, and remind the contractor of the notification requirements of the Limitation of Cost clause.

342.7103-2 Procedures.

(a) Upon notification that a cost overrun is anticipated,

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the contracting officer shall inform the contractor to submit a request for additional funds which is to include:

(1) **Name** and address of contractor.

(2) Contract number and expiration **date**.

(3) Contract item(s) and amount(s) creating the overrun.

(4) The elements of cost which changed from the original estimate (i.e., labor, material, travel, overhead, etc.) to be furnished in the following format:

(i) Original estimate,

(ii) Costs incurred to **date**,

(iii) Estimated cost to completion,

(**iv**) Revised estimate, and

. (v) **Amount of** adjustment.

(5) The factors responsible for the increase, i.e., error in estimate, changed conditions, etc.

(6) The latest date by which funds must be available for commitment to avoid contract slippage, work stoppage, or other program impairment.

(**b**) When the contractor submits a notice of an impending overrun., the contracting officer shall:

(1) Immediately advise the appropriate program office and furnish a copy of the notice and any other data received:

(2) Request audit or cost advisory services, and technical support, as necessary, for evaluation **of** information and data received; and

(3) Maintain continuous follow-up with the program office in order to obtain a timely decision as to whether the work under the contract should **be** continued and additional funds provided, or the contract terminated. The decision of the program office must be supported by **an** appropriate written statement and

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funding authority, or a formal request for termination, when applicable. After a programming and funding decision is received from the program office, the contracting officer shall promptly notify the contractor in writing that:

(i) A specified amount of additional funds has been allotted to the contract by a contractual instrument; or

(ii) **Work** will be discontinued when the funds allotted to the contract have been exhausted, and that any work performed after that date is **at** the contractor's risk; or

(iii) The Government is considering whether additional funds should be allotted to the contract and will notify the contractor **as** soon as possible, but that any work performed after the funds then allocated to the contract have been exhausted is at the contractor's risk.

Timely, formal notification of the Government's intention is essential in order to preclude loss of contractual rights in the event of dispute, termination, or litigation.

(c) If **program** requirements permit, contracting officers should refrain from issuing **any** contractual documents which will require new work or an extension of time, pending resolution of an overrun or additional fund request.

342.7104 Contract modifications.

(a) Modifications to contracts containing the Limitation of Cost clause shall include either:

(1) **A provision** increasing the estimated or ceiling amount referred to in the Limitation of Cost clause of the contract and stating that the clause will thereafter apply in respect to the increased amount; or

(2) A provision stating that the estimated or ceiling amount referred to in the **contract** is not changed by the modification and that the Limitation of Cost clause will continue to apply with respect to the amount in effect prior to the modification.

(b) A fixed-fee provided in a contract shall not be changed when funding a cost overrun. Changes in fixed-fee will be made only to reflect changes in the scope of work which justify an increase or decrease in fee.

Subpart 342.72

Payments to Contractors

342.7200 Scope of subpart.

This subpart prescribes policies and procedures relating to (a) the requirements of the Prompt Payment Act (Public Law 97-177), (b) the implementation of P. L. 97-177 by the Office of Management and Budget (OMB) Circular No. A-125, (c) invoice requirements and matters **concerning payments** to contractors, and (d) wire transfer payment procedures.

342.7201 Definitions.

'The terms used in this subpart have the meanings set forth below:

"Applicable interest rate" means the interest rate established by the Secretary of the Treasury under Section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611).

"Business concern (Contractor)" means any person or organization engaged in a profession, trade or business; and nonprofit entities (including State and local governments, Federally recognized Indian Tribal governments, and educational institutions, **but** excluding Federal entities) operating as contractors.

"Contract" means any enforceable agreement, including rental and lease agreements and purchase orders. This definition also includes basic ordering agreements, blanket purchase agreements and other types of agreements under which calls or orders **may** be issued.

"Designated payment office" means the place named in the contract where invoices will be forwarded for payment, or in certain instances, for approval.

"Due date" means the date on which Federal payment should be made.

"Discount date" means the date by which, if payment is made, a specified discount can be taken.

"Payment date" means the date on which a check for payment is dated or a wire transfer of funds is made.

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"Proper invoice" means a bill or written request for payment provided by a business concern for property delivered **or** services rendered. A proper invoice must contain the data required by the contract.

"Receipt of invoice" means the later of:

-- The date a proper invoice is actually received in the designated payment office, or

-- The date on which HHS accepts the property or service.

"Receiving report" means written evidence of acceptance of property or services by the designated receiving official. Receiving reports must meet the requirements of **342.7205-3**.

"Designated receiving official" **means** the individual designated:

-- Pursuant to § 103-27.5018 of *the* HHS Materiel Management **Manual** to receive property for his/her activity, or

-- In the contract, e.g., the project officer, or by the agency to accept services rendered under a contract.

"Fiscal office" means the office responsible for: **(a)** determining whether interest penalties are due a contractor and, if **so**, the amount, **(b)** determining whether an invoice offers a financially advantageous discount, **(c)** maintaining records for and submission of prompt payment reports **to** the Deputy **Assistant** Secretary, Finance (**DASP**), ASMB, OS, and **(d)** processing payments to the Treasury Department to allow for payment to a contractor when due.

342.7202 Policy and responsibilities.

(a) Each **OPDIV** and **STAFFDIV** head and regional director is responsible for ensuring timely payment **and** the payment of interest penalties when required.

(b) Contracting officers shall include payment provisions in all contracts and purchase orders and, when necessary, participate in the processing of invoices in a timely manner so that payment may be made as close **as** possible to, but not later

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than, the due date or, if appropriate, the discount date. Payment will be based on receipt of proper invoices and satisfactory performance of contract terms.

(c) Notice of an apparent error, defect, or impropriety in an invoice shall be given to a business concern within 15 days of receipt of an invoice (3 days **for** meat or meat food products and 5 days **for** perishable agricultural commodities). The notice shall be suitably documented.

(d) OPDIV and STAFFDIV heads and regional directors shall ensure that receipt and acceptance are executed **as promptly as possible**. Receiving reports shall be forwarded in time to be received by the designated payment office by the fifth business day after acceptance, unless other arrangements **are** made. Designated payment offices shall stamp receiving reports and invoices with the date **received** in those offices.

(e) Any OPDIV, STAFFDIV or regional office which acquires property **or** services from a business concern, but which does not make payment for each complete delivered item of property or service by the required payment date, shall pay an interest penalty to the business concern as provided in the Payment Due Date clause in the contract.

(f) It is the policy of the Government to defer payment until as close as administratively possible to the due date for payment or, if appropriate, the discount **date**. In addition, payments shall not be expedited to earn discounts for early payment unless discounts are determined to be economical. These practices will tend to maximize cash balances available to the Treasury, reduce the need for borrowing, and thus contribute to lowering the public debt.

(g) If a business concern offers an activity a discount from the amount otherwise due under a contract for property or services in exchange for payment within a specified period of time, the activity may make payment in an amount equal to the discounted price only if payment is made within the specified period of time. Each activity which violates this provision shall pay an interest penalty on any amount which remains unpaid and on which the agency fails to correct the underpayment within 15 days of the expiration of the discount period (**3** days for meat and meat food products, and 5 days for perishable agricultural commodities).

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(h) Interest penalties will be paid without the need for business concerns requesting them, except as provided in 342.7205-S. Interest penalty payments will be absorbed within funds available for the administration or operation of the program for which the penalty was incurred.

342.7203 Exemptions.

The provisions of this subpart 342.72 are not applicable to the following types of contracts:

(a) Contracts when payments are made for financing purposes before receipt of complete delivered items of property or service.

(b) Contracts for utilities (gas, water, electricity, etc.) that include provisions for late payment charges established by tariff or State regulatory commissions.

(c) Informal contracts for the purchase of utilities under a tariff when the tariff provides for late payment charges.

(d) Cost-reimbursement contracts are exempt from the clause required by 342.7204, but must contain the clause required by **342.7205-(1)(d)**.

342.7204 Contract clause - general.

The contracting officer shall insert the clause at 352.242-72, Interest on Overdue Payments, in solicitations and contracts unless exempted by 342.7203.

342.7205 Payment terms in contracts.

342.7205-1 General requirements.

The contracting officer shall include the Government's terms of payment in each nonexempt contract and purchase order (see 342.7203) in accordance with the guidelines in this section. The clauses established by this section may be modified provided the basic features are included in the payment terms. For example, the contracting officer may modify the clause to provide for special billing instructions or other administrative matters or to allow for a due date for payment beyond 30 days if, in consultation with the designated receiving official, it

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is determined that the property or services **may** require additional time **for** inspection review (see **342.7205-3(c)**).

(a) Payment due dates based on receipt of invoices under purchase orders and fixed-price type contracts.

(1) The contracting officer should insert the clause at 352.242-73, Invoice Payment, in solicitations and contracts when invoices required to be furnished by contractors may be received before the Government has had an opportunity to inspect and accept the supplies or services. It shall be stipulated in the payment terms that payment will be due on the later of receipt of the invoice, or acceptance of the supplies or services.

(2) The contracting officer should insert the clause at **352.242-74**, Payment Due Date, in solicitations and contracts when invoices may be required to reflect that delivery (or performance) and acceptance has already occurred. This would be the situation in the case of supplies purchased on an **f.o.b.** origin basis, with inspection and acceptance at source, and proof of shipment (e.g., a Government bill of lading) required to be furnished with the invoice. This **may also** be the **case** with respect to various contracts for services.

(b) Due dates based on delivery.

(1) The Prompt Payment Act requires payment to be made not later than 7 days after the date of delivery of meat and **meat** food products, as defined in section 2(a)(3) of the Packers and Stockyards Act of 1921 (7 U.S.C. **182(3)**). Contracts for these commodities should require invoices to be furnished with each shipment, and payment terms **may** stipulate that supplies will **not** be deemed to be delivered until the later of the date of actual delivery or the date of receipt of a proper invoice. The contracting officer should insert the **clause at 352.242-75**, Invoice Payment, in solicitations and resultant contracts for the acquisition of meat and meat food products **as** discussed in this **342.7205-1(b)(1)**.

(2) The circumstances regarding **meats, as** described in the preceding paragraph, also apply to perishable agricultural commodities, as defined in section 1(4) of the Perishable Agricultural Commodities Act of 1930 (7 U.S.C. **499a(4)**), except

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that the required time for payment is 10 calendar days after delivery. This period is subject to changes based on any amendment to the Perishable Agricultural Commodities Act of 1930, or any implementing regulations issued thereunder. Contracts for these commodities should **require** invoices to be furnished with each shipment, and payment terms may stipulate that supplies will not be deemed to be delivered until the later of the day of actual delivery or ~~the~~ date of receipt of a proper invoice. The contracting officer should insert the clause at **352.242-76**, Invoice Payment, in solicitations and resultant contracts for the acquisition of perishable agricultural commodities as discussed in this **342.7205-1(b)(2)**.

(c) Recurring payments under leases of real property.

Leases of real property usually provide for payment in arrears of a fixed amount, due on the first day of each month. Payment terms should provide that payment is due on a workday early in the month, but not in excess of the fifth workday.

(d) Cost-reimbursement type contracts. The contracting officer should insert the clause set forth at **352.242-77**, Invoice Payment, in solicitations for which award of a **cost-reimbursement** type contract is contemplated and in resultant cost-reimbursement type contracts.

342.7205-2 Invoice requirements.

(a) Basic requirements of a proper invoice.

(1) Public Law 97-177 provides, in section **6(3)**, that "an invoice shall be considered a 'proper invoice' when it contains **or** is accompanied by such substantiating documentation (i) as the Director of the Office of Management and Budget may require by regulation, and (ii) as the Federal agency involved may require by regulation **or** contract."

(2) **OMB** Circular A-125 provides that the following data must be included in an invoice for it to constitute a proper invoice:

(i) Name of the business concern and invoice date.

(ii) Contract number, or other authorization for delivery of property or services.

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(iii) Description, price, and quantity of property and services actually delivered or rendered.

(iv) Shipping and payment terms.

(v) Name (where practicable), title, phone number, and complete mailing address of responsible official to whom payment is to be sent.

(vi) Other substantiating documentation or information as required by the contract.

(b) Invoice requirements clause. The contracting officer should insert the clause set forth at **352.242-78**, Invoice Submission, in nonexempt solicitations and contracts (see 342.7203). The **clause** may be modified to provide for agency needs.

342.7205-3 Receiving reports.

(a) Employees responsible for the inspection and acceptance of property or services **are** to complete their actions and forward the necessary paperwork **to** the **fiscal office** within 5 Government working days of the receipt of the property or rendering of the service, or upon completion of **special** contract requirements, e.g., installation or testing.

(b) Programmatic review of invoices will be completed by the project officer and forwarded to the contracting officer within five calendar days of their receipt.

(c) The above employees must inform the contracting officer, prior to award, of any extraordinary inspection/review requirements that may not **allow for** their effort to be completed within the five day period so that these requirements may be included in the contract.

(d) The contracting officer shall ensure that the contract file contains adequate documentation to substantiate the basis for extraordinary inspection/review requirements.

(e) Receiving reports for property must include:

(1) Contract or other authorization number.

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(2) Name of contractor.

(3) Product or service description.

(4) **Quantities** received and accepted, if applicable.

(5) Date(s) property or services were accepted.

(6) Signature, printed name, title, phone number, and mailing address of the designated receiving official.

342.7205-4 Processing invoices.

(a) Submission of invoices.

(1) The "Invoice Submission" article of the contract shall instruct the contractor where all invoices will be submitted.

(2) Normally, the invoice will be submitted directly to the fiscal office. Immediately upon receipt, the payment officer shall date stamp and review the invoice to determine whether it is proper. **If** the invoice contains an apparent error, defect, or impropriety, written notification shall be given to the contractor as early as possible but in **no** event later than 15 calendar **days** of the receipt of the invoice (3 days for meat or meat food products and 5 days for perishable agricultural commodities).

(3) If the invoice is considered proper, the payment officer shall place it in a system where periodic follow-up action can be taken and forward a copy to the contracting officer if his/her **approval is required before payment can be made so that** the contracting officer **can** return the **approved invoice** in sufficient time for **payment to be made by the payment due date**. In the latter **case, close coordination is essential** between the paying office **and** the approving official.

(4) Fiscal and contracting officers may **agree** to allow for invoices requiring contracting officer approval to be submitted by the fiscal office directly to the project officer for review and subsequent submission to the contracting officer for approval. If a receiving report or invoice requiring contracting officer approval is not received in the fiscal office when due, the payment officer **will** request immediate submission from the responsible office.

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(5) **OPDIVs, STAFFDIVs** and regional offices may elect to require contractors to submit invoices directly to the contracting officer for processing. However, when this option is used, the OPDIV, STAFFDIV, or regional office shall develop procedures to assure prompt approval and payment of invoices and shall maintain standards against which timely payment of invoices can be evaluated. These procedures and standards shall be developed in conjunction with the fiscal office and a copy shall be submitted through acquisition channels to the Director, Office of Procurement and Logistics Policy (OPLP) OPAL-OS. The Director, OPLP, will submit a copy of the procedures and standards to the Director, Division of Cash Management Policy and Procedures (DCMPP), OS.

(b) Receipt and **processing** invoices by the contracting officer.

(1) **Immediately** upon receipt, the contracting officer shall date stamp each invoice and review it to determine if the submission is in accordance with the terms of the contract. This date will establish the payment due date or defective invoice notification date when the contracting office is identified as the designated payment office.

(2) When the contract identifies the contracting office as the designated payment (approval) office and a submission is deficient, the contracting officer shall give the contractor written notice of the apparent error, defect, or-impropriety within **15** calendar days of the receipt of the invoice (3 days for meat or meat food products and 5 days for perishable agricultural **commodities**). A copy of the notice will be submitted to the fiscal office. However, payment of an invoice should not be delayed because a minor amount is in question. Generally, a minor amount is considered to be less than **10%** of the invoiced amount. The contractor should be informed of the problems in writing and, if appropriate, the amount deleted from the invoice and payment made. The contract file should be documented as to the action taken.

(3) The contracting officer, with assistance from the project officer, must insure that payments are **commensurate** with technical progress under the contract.

(4) With respect to contracts where the work is budgeted by phase or task, payment to the contractor shall be limited to the amount specified

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for each phase or task. Approval of invoices is thus controlled by these incremental limitations. Special care should be exercised to assure payments are not made prematurely, e.g., when authorizations to proceed to subsequent tasks are contingent upon **approval** of the prior task. It is, therefore, mandatory that those contracts susceptible to phasing require billing and financial **reporting** by tasks or phases.

(5) The Fixed-Fee clause prescribed at FAR 52.216-8 provides that after payment of 85% of the fixed-fee the contracting officer may withhold further payment of fee, within specified limits, only if he/she considers withholding necessary to protect the interests of the Government. Fees shall not be withheld unless the contracting officer makes a determination that such action is in the best interest of the Government and informs the contractor in writing of the reasons for withholding within the time periods set forth in (2) above. A copy of the notification shall be submitted to the fiscal office.

(6) The Allowable Cost and Payment clause prescribed at FAR 52.216-7 requires the contracting officer to make payment in amounts determined to be allowable. The contracting officer shall notify a contractor in writing, within the time periods set forth in (2) above, of any determination to withhold costs. Notification shall be made orally and confirmed in writing if it cannot be made timely. A copy of the notification shall be submitted to the fiscal office. The contracting officer shall follow the procedures in FAR 42.801 if, during the course of contract performance, costs are withheld because they are determined to be unallowable (see FAR 31.001). The notice of intent to disallow costs shall contain the appropriate elements set forth in FAR **42.801(c)**.

(7) . When a contract requires payment to be made within **30** days after receipt of a proper invoice, the contracting officer shall submit the approved invoice to the fiscal office no later than sixteen (16) calendar **days** from receipt of a proper invoice by the designated payment office. However, when a contract provides for a payment due date other than 30 days after receipt of a proper invoice, and if contracting officer approval of the invoice is required before payment can be made, the contracting officer shall reach agreement with the fiscal office prior to award as to when the invoice must be received in the designated payment office.

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(8) When **an** invoice offers **a financially advantageous discount**, the contracting officer shall submit **the** approved invoice **to the fiscal office in sufficient time to** insure payment within the discount period. The fiscal office is responsible for determining if a discount is financially advantageous to take in accordance with Federal Cash Management Guidelines.

(c) Alternative procedures for invoice processing.

In the event an OPDIV, STAFFDIV, or regional office is consistently unable to meet the prior review and approval requirements, it may submit an alternative plan to the Assistant Secretary for Management and Budget for approval that provides for:

(1) Submission of SF-1166, Voucher and Schedule of Payments, to the Treasury Department to allow for payment to be made when due or within the discount period:

(2) Review by the project officer and approval by the contracting officer of the invoice within **15** days after payment;

(3) Any necessary adjustments in the subsequent voucher payments; and

(4) Payment of completion and final vouchers only after approval by the contracting officer.

The plan must explain why the OPDIV, STAFFDIV, or regional office is unable to **meet** the review and approval period. All approved alternative payment plans will **be subject** to periodic review and reevaluation.

342.7205-5 Interest penalty payments.

(a) An interest penalty will be determined and paid automatically by the fiscal office when all of the following conditions are met:

(1) There is a contract or purchase order with a business concern which contains the Interest on Overdue Payments clause set forth in **352.242-72**.

(2) Federal acceptance of property or **services** has occurred and there is no disagreement over **quantity**, quality, or other. **contract** provisions.

Payments to Contractors

(3) A proper invoice has been received (except where no invoice is required, e.g., some periodic lease payments) or the activity fails to give notice that the invoice is not proper within **15** days of receipt of an invoice (3 days for meat or meat food products, and 5 days for perishable agricultural commodities).

(4) Payment is made to the business concern **more** than 15 days after the due date (3 days for meat or meat food products, and **5** days for perishable agricultural commodities).

(b) An interest penalty for contracts containing the Interest on Overdue Payments clause set forth at 352.242-72 will also **be** paid if an activity takes a discount after the discount period has expired, and fails to correct the underpayment within 15 days of the expiration **of** the discount period (**3** days for meat and meat food products, and 5 days for perishable agricultural commodities).

(c) Interest penalties are not required when payment is delayed because of a disagreement between a Federal agency and a business concern over the amount of the payment or other issues concerning compliance with the terms of a contract: nor are they required when payments are made solely for financing purposes, or for a period when amounts are withheld temporarily in accordance with **the** contract. Claims concerning disputes, and any interest that may be payable with respect to the period while the dispute is being settled, will **be** resolved in accordance with the provisions in the Contract Disputes Act of 1978 (**41 U.S.C. 601 et** seq.).

342.7206 Method of **payment**.

342.7206-1 General.

(a) The Department **of the Treasury has initiated** a program to make contract payments by wire transfer through the Treasury Financial Communications System (**TFCS**). During its initial phases, payments will be made by both **check** and wire transfer. The determination of the method of payment will **be** directed by the Department of Treasury through establishment of a vendor payment amount threshold above which TFCS payments will **be** required.

:

Payments to **Contractors**

(b) Procedures for processing payments through the TFCS may be found in Chapter 2500, Part 4, Volume 1, of the Treasury Fiscal Requirements Manual.

(c) To accommodate payments by either of the payment methods discussed in paragraph (a) of this section, it is necessary that the check payment address and appropriate bank account information be obtained from Government contractors. The contract clause discussed at 342.7206-2 is designed to elicit the necessary information.

342.7206-2 Method of payment.

(a) The contracting officer shall insert the **clause set** forth at **352.242-79**, Method of Payment, in each solicitation and contract to give the Government the option to pay by check or wire transfer and require contractors to furnish the address where check payments should be sent and the appropriate bank account information needed to accomplish wire transfers.

(b) The office making payment shall be identified in the **Method** of Payment clause as the office designated to receive payment information. Payment information on assigned contracts will be obtained from the assignee by the office making payment if the contractor is unable to obtain it from the assignee.

342.7206-3 Coordination with paying offices.

The office designated to receive payment information shall establish procedures for handling the information and appropriate internal controls to preclude release of the information to unauthorized individuals. If the documented information is not received within five working days after it is due, the payment officer will request the contracting officer to require the contractor to **submit** the information in sufficient time to avoid a delay in payment.

Part 345

Government Property

Subpart 345.3 - Providing Government Property
to Contractors

Section
345.370

Providing Government property (in general).

Subpart 345.4 - Contractor Use and Rental of
Government Property

345.405

Contracts with foreign governments or
international organizations.

Subpart 345.3

Providing Government Property to Contractors

345.370 Providing Government property (in general).

(a) A contractor may be provided Government property or allowed to acquire such property at Government expense upon determination that:

(1) No practicable or economical alternative exists; e.g., acquisition from other sources, utilization of subcontractors, rental of property, or modification of program project requirements, etc.;

(2) The Government receives adequate consideration for providing the property; **or**

(3) Furnishing Government property is likely to result in substantially lower cost to the Government for the items produced or services rendered when all costs involved (e.g., transportation, installation, modification, maintenance, etc.) are compared with the cost to the Government of the **contractor's** use of privately-owned property.

(b) The determination that it is necessary to provide a contractor or subcontractor with property will be made by the contracting officer with the advice **of** the agency property official.

(c) If the program **office** is aware, prior to the submission of the request for contract, that it will be necessary to provide prospective contractors with property, a written justification must accompany the request for contract **to** the contracting activity.

Subpart 345.4

Contractor Use and Rental
of Government Property

345.405 Contracts with foreign governments **or** international organizations.

Upon the request of a foreign government or international organization, or a contractor certifying that it is acting on behalf of a foreign government or international organization, the contracting officer, with advice from the agency property official cognizant of Government property located in the United States, its possessions, or Puerto Rico, may give written approval for its use without charge on contracts or subcontracts thereunder if:

(a) The foreign government or international organization would be authorized to place the contract with the activity concerned under the Foreign Assistance Act of 1961, as amended, or such use is authorized by an agreement with the foreign government:

(b) The foreign government's placement of the contract directly with the contractor is consistent with the best interests of the United States;

(c) It appears that the foreign government will place the contract with the contractor whether or not use is authorized, and no competitive pricing advantage will accrue to the contractor by virtue of its use;

(d) The contractor agrees that no charge for the use of the **property will** be included in the price charged the foreign government under the contract; and

(e) The use will not interfere with foreseeable requirements of the United States.

Part 352

Solicitation Provisions
and Contract Clauses

Subpart 352.2 - Texts of Provisions
and Clauses

Section

352.202-1	Definitions.
352.215-12	Restriction on Disclosure and Use of Data.
352.215-72	Pre-Proposal Conference.
352.216-70	Negotiated Overhead Rates - Fixed.
352.216-72	Additional Cost Principles.
352.224-70	Confidentiality of Information.
352.228-7	Insurance - Liability to Third Persons.
352.232-9	Withholding of Contract Payments.
352.232-71	Cost Sharing.
352.232-73	Method of Payment - Letter of Credit.
352.232-74	Estimated Cost and Fixed Fee - Incrementally Funded Contract.
352.232-75	Incremental Funding.
352.233-70	Litigation and Claims.
352.237-70	Consulting Services Reporting.
352.242-71	Final Decisions on Audit Findings.
352.249-14	Excusable Delays.
352.270-1	Accessibility of Meetings, Conferences, and Seminars to Persons with Disabilities.
352.270-2	Indian Preference.
352.270-3	Indian Preference Program.
352.270-4	Pricing of Adjustments.
352.270-5	Key Personnel.
352.270-6	Publications and Publicity.
352.270-7	Paperwork Reduction Act.

Subpart 352.2

Texts of Provisions and Clauses

352.202-1 Definitions.

Insert the following clause in all solicitations and resultant contracts instead of the clause in FAR **52.202-1**, except when contemplating (a) a fixed price research and development contract that **is expected** to be \$2,500 or less, or (b) a purchase order.

DEFINITIONS (APR 1984)

(a) The term **"Secretary"** or **"Head of the Agency"** (also called **"Agency Head"**) means the Secretary, Under Secretary, or any Assistant Secretary, Administrator or Commissioner, of the Department of Health and Human Services: and the term "his/her duly authorized representative" means any person, persons, or board authorized to act for the Secretary.

(b) The term "Contracting Officer" means a person with the authority to enter into, administer, and/or terminate **contracts** and **make** related determinations and findings. The term **includes** certain authorized representatives of the Contracting Officer acting within the limits of their authority as delegated by the Contracting Officer.

(c) The term "Project Officer" means the person representing the Government for the purpose of technical monitoring of contract **performance**. The Project Officer is not authorized to issue **any** instructions or directions which effect any increases or decreases in the scope of work or which would result in the increase or **decrease of the price** of this **contract or a change in the delivery** dates or performance period of this contract.

(d) The term **"Department"** means the Department of Health and Human Services.

(e) Except as **otherwise** provided in this contract, the term **"subcontract"** includes purchase **orders under this contract**.

(End of clause)

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Alternate I (APR 1984). For cost-reimbursement contracts other than purchase orders, delete paragraph (c) above and replace with the following paragraph (c):

(c) The term "Project Officer" means the person representing the Government for the purpose of technical monitoring of contract performance. The Project Officer is not authorized to issue any instructions or directions which *effect any increases or decreases in the scope of work or which would result in the increase or decrease of the cost of this contract or a change in performance period of this contract.* In addition, the Project Officer is not authorized to receive or act upon the Contractor's notification of a revised cost estimate pursuant to the Limitation of Cost or Limitation of Funds clause of this contract.

352.215-12 Restriction on Disclosure and Use of Data.

Insert the following provision in all requests for proposals, and all requests for quotations other than those for information or planning purposes. This provision shall be used in lieu of the provision in FAR 52.215-12.

RESTRICTION ON **DISCLOSURE** AND USE OF DATA (APR 1984)

The proposal submitted in response to this request may contain data (trade secrets; business data, e.g., commercial **information**, financial information, and cost and pricing data; and technical data) which the offeror, including its *prospective subcontractor(s)*, does not want used or disclosed for any purpose other than for evaluation of the **proposal**. The use and disclosure of any data may be so restricted; provided, that the Government determines that the data is not required to be disclosed under the Freedom of Information Act, 5 U.S.C. 552, as amended, and the offeror marks the cover sheet of the proposal with the following legend, specifying the particular portions of the proposal which are to be restricted in accordance with the conditions of the legend. The Government's determination to withhold or disclose a record will be based upon the particular circumstances involving the record in question and whether the record may be exempted from disclosure under the Freedom of Information Act:

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Unless disclosure is required by the Freedom of Information Act, 5 U.S.C. 552, as amended, (the Act) as determined by Freedom of Information (FOI) Officials of the Department of Health and Human Services, data contained in the portions of this proposal which have been specifically identified by page number, paragraph, etc. by the offeror as containing restricted information shall not be used or disclosed except for evaluation purposes.

The offeror acknowledges that the Department may not be able to withhold a record (data, document, etc.) nor deny access to a record requested pursuant to the Act and that the Department's FOI Officials must make that determination. The offeror hereby agrees that the Government is not liable for disclosure if the Department has determined that disclosure is required by the Act.

If a contract is awarded to the offeror as a result of, or in connection with, the submission of this proposal, the Government shall have the right to use or disclose the data to the extent provided in the contract. Proposals not resulting in a contract remain subject to the Act.

The offeror also agrees that the Government is not liable for disclosure **or** use of unmarked data and may use or disclose the data for **any** purpose, including the release of the information pursuant to requests under the Act.

The data subject to this restriction are contained in pages (insert page *numbers*, paragraph designations, etc. or other identification).

In addition, the offeror should mark each page of data it wishes to restrict with the following legend:

"Use or disclosure **of** data contained on this page is subject to the restriction on the cover sheet of this proposal or quotation."

Offerors are cautioned that proposals submitted with restrictive legends or statements differing in substance from the above legend may not be considered for award. The Government reserves the right **to** reject any proposal submitted with a nonconforming legend.

(End of Provision)

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352.215-72 Pre-Proposal Conference.

If a pre-proposal conference is to be held as indicated in FAR 15.409, insert the following provision in the **affected solicitation**:

PRE-PROPOSAL CONFERENCE (APR 1984)

A pre-proposal conference will be held with prospective offerors at (insert local prevailing time) on (insert date) in room (insert room number) at (insert name and location of building).

The pre-proposal conference will be held for the purpose of providing **information** concerning the Government's requirements which may be helpful in the preparation of proposals and for answering any questions which you have regarding this solicitation.

The success of this type of conference depends largely on the **leadtime** available to the Government for research in connection with questions submitted by prospective offerors. Therefore, you are requested to mail written questions concerning any areas of uncertainty which, in your opinion, require clarification or correction, in sufficient time to be received on or before (insert date).

Your questions should be submitted to the Contracting Officer, (insert name of Contracting Officer), and the envelope should be marked "**Pre-Proposal Conference, RFP No. (insert number of RFP).**" A set of questions and answers will be furnished to all prospective offerors whether or not they are in attendance.

Because of space limitations, each prospective offeror will be limited to a total of (insert number) representatives.

Attendance at the pre-proposal conference is recommended; however, attendance is not a prerequisite for proposal submission and will not be considered a factor in proposal evaluation.

(End of provision)

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352.216-70 Negotiated Overhead Rates-Fixed.

Insert the following clause in all cost-reimbursement contracts with educational institutions and nonprofit organizations when fixed rates subject to carry forward adjustments are used.

NEGOTIATED OVERHEAD RATES-FIXED (APR 1984)

(a) Notwithstanding the provisions of the clause entitled "Allowable Cost and Payment," the allowable indirect costs under this contract shall be obtained by applying negotiated fixed overhead rates for the applicable period(s) to bases agreed upon by the parties, as specified below. A negotiated fixed rate(s) is based on an estimate of the costs which will be incurred during the period for which the rate(s) applies. When the application of the negotiated fixed rates against the actual bases during a given fiscal period produces an amount greater or less than the indirect costs determined for such period, such greater or lesser amount(s) will be carried forward to a subsequent period.

(b) The Contractor, as soon as possible but no later than six months after the close of its fiscal year, or such other period as may be specified in the contract, shall submit to the Secretary or the duly authorized representative, with a copy to the cognizant audit activity, a proposed fixed overhead rate or rates based on the Contractor's actual cost experience during the fiscal year, including adjustment, if any, for amounts carried forward, together with supporting cost data. Negotiation of fixed overhead rates, including carryforward adjustments, if any, by the Contractor and the Secretary, or the duly authorized representative, shall be undertaken as promptly as practicable after receipt of the Contractor's proposal.

(c) Allowability of costs and acceptability of cost allocation methods shall be determined in accordance with Part 31 of the Federal Acquisition Regulation (FAR) as in effect on the date of this contract.

(d) The results of each negotiation shall be set forth in an amendment to this contract, which shall specify: (1) The agreed fixed overhead rates, (2) the bases to which the rates apply, (3) the fiscal year, unless the parties agreed to a different period, for which the rates apply, and (4) the specific items treated as direct costs or any changes in the items previously agreed to be direct costs.

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(e) Pending establishment of fixed overhead rates *for any* fiscal year or different period agreed to by the parties, the Contractor shall be reimbursed either at the rates fixed for the previous fiscal year or other period or at billing rates acceptable to the Contracting Officer, subject to appropriate adjustment when the final rates for that fiscal year or other period are established.

(f) Any failure of the parties to agree on any fixed overhead rate or rates or to the amount of any carryforward adjustment under this clause shall not be considered a dispute concerning a question of fact for decision by the Contracting Officer within the meaning of the **"Disputes"** clause of this contract. If for any fiscal year or other period specified in the contract, the parties fail to agree to a fixed overhead rate or rates, it is agreed that the allowable indirect costs under this contract shall be obtained by applying negotiated final overhead rates in accordance with the terms of the **"Allowable Cost and Payment"** clause set forth in FAR 52.216-7, as in effect on the date of this contract.

(g) Submission of proposed fixed, provisional, and/or final overhead rates, together with appropriate data in **support** thereof, to the Secretary or the duly authorized representative and agreements on fixed, provisional, and/or final overhead rates entered into between the Contractor and the Secretary or the duly authorized representative, as evidenced by Negotiated Overhead Rate Agreements signed by both parties, shall be deemed to satisfy the requirements of paragraphs (b), (d), and (e), of this clause.

(End of clause)

352.216-72 Additional Cost Principles.

As prescribed in 316.307(j), insert the following clause in all solicitations and resultant *cost-reimbursement contracts with* nonprofit organizations, as identified in **OMB** Circular A-122.

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ADDITIONAL COST PRINCIPLES (OCT 90)

(a) Bid and proposal costs. (1) Bid and proposal costs are the immediate costs of preparing bids, proposals, and applications for potential Federal and non-Federal contracts, grants, and agreements, including the development of scientific, cost, and other data needed to support the bids, proposals, and applications.

(2) Bid and proposal costs of the current accounting period are allowable as indirect costs.

(3) Bid and proposal costs of past accounting periods are unallowable in the current period. However, if the organization's established practice is to treat these costs by some other method, they may be accepted if they are found to be reasonable and equitable.

(4) Bid and proposal costs do not include independent research and development costs covered by the following paragraph, or preaward costs covered by paragraph 33 of Attachment B to OMB Circular A-122.

(b) Independent research and development costs.

(1) Independent **research and development** is **research** and development conducted by an organization which is not sponsored by Federal or non-Federal contracts, grants, or other agreements.

(2) Independent research and development shall be allocated its proportionate share of indirect costs on the same basis as the allocation of indirect costs to-sponsored research and development.

(3) The costs of independent research and development, including its proportionate share of indirect costs, are unallowable.

(End of clause)

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352.224-70 Confidentiality of Information.

The following clause is covered by the policy set forth in Subpart 324.70 and is to be used in accordance with the instructions set forth in 324.7004.

CONFIDENTIALITY OF INFORMATION (APR 1984)

(a) Confidential information, as used in this clause, means (1) information or data of a personal nature about an individual, or (2) proprietary information or data submitted by or pertaining to an institution or organization.

(b) In addition to the types of confidential information described in (a)(1) and (2) above, information which might require special consideration with regard to the timing of its disclosure may derive from studies or research, during which public disclosure of preliminary unvalidated findings could create erroneous conclusions which might threaten public health or safety if acted upon.

(c) The Contracting Officer and the Contractor may, by mutual consent, identify elsewhere in this contract specific information and/or categories of information which the Government will furnish to the Contractor or that the Contractor is expected to generate which is confidential. Similarly, the Contracting Officer and the Contractor may, by mutual consent, identify such confidential information from time to time during the performance of the contract. Failure to agree will be settled pursuant to the "Disputes" clause.

(d) If it is established elsewhere in this contract that information to be utilized under this contract, or a portion thereof, is subject to the Privacy, Act, the Contractor will follow the rules and procedures of disclosure set forth in the Privacy Act of 1974, 5 D.S.C. 552a, and implementing regulations and policies, with respect to systems of records determined to be subject to the Privacy Act.

(e) Confidential information, as defined in (a)(1) and (2) above, that is information or data of a personal nature about an individual, or proprietary information or data submitted by or pertaining to an institution or organization, shall not be disclosed without the prior written consent of the individual, institution, or organization.

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(f) Written advance notice of at least 45 days will **be** provided to the Contracting Officer of the **Contractor's** intent to release findings of studies or research, which have the possibility of adverse effects on the public or the Federal agency, as described in (b) above. If the Contracting Officer does not pose any objections **in** writing within the 45-day period, the Contractor may proceed with disclosure. Disagreements not resolved by the Contractor and the Contracting officer will be settled pursuant to the **"Disputes"** clause.

(g) Whenever the Contractor is uncertain with regard to the proper handling of material under the contract, or if the material in question is subject to the Privacy Act or is confidential information subject to the provisions of this clause, the Contractor should obtain a written determination from the Contracting Officer prior to any release, disclosure, dissemination, or publication.

(h) Contracting Officer determinations will reflect the results of internal coordination with appropriate program and legal officials.

(i) The provisions of paragraph (e) of this clause shall not apply when the information is subject to conflicting or overlapping provisions in other Federal, State or **local laws**.

(End of clause)

352.228-7 Insurance - Liability to Third Persons.

As prescribed in 328.311-2, contracting officers shall include the following clause in all cost-reimbursement contracts, in lieu of the clause at FAR 52.228-7:

INSURANCE - LIABILITY TO THIRD PERSONS (DEC 1991)

(a)(1) Except **as** provided in subparagraph (2) immediately following, or in paragraph (h) of this clause (if the clause has a paragraph (h)), the Contractor shall provide and maintain **workers'** compensation, employer's liability, comprehensive general liability (bodily injury), comprehensive automobile liability (bodily injury and property damage) **insurance**, and such other insurance **as** the Contracting **Officer** may require under this contract.

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(2) The Contractor may, with the approval of the Contracting Officer, maintain a self-insurance program: provided that, with respect to workers' compensation, the Contractor is qualified pursuant to statutory authority.

(3) All insurance required by this paragraph shall be in a form and amount and for those periods as the Contracting Officer may require or approve and with insurers approved by the Contracting Officer.

(b) The Contractor agrees to submit for the Contracting Officer's approval, to the extent and in the manner required by the Contracting Officer, any other insurance that is maintained by the Contractor in connection with performance of this contract and for which the Contractor seeks reimbursement.

(c) Except as provided in paragraph (h) of this clause (if the clause has a paragraph (h)), the Contractor shall be reimbursed -

(1) For that portion (i) of the reasonable cost of insurance allocable to this contract, and (ii) required or approved under this clause; and

(2) For certain liabilities (and expenses incidental to such liabilities) to third persons not compensated by insurance or otherwise within the funds available under the Limitation of Cost or the Limitation of Funds clause of this contract. These liabilities must arise out of the performance of this contract, whether or not caused by the negligence of the Contractor or of the Contractor's agents, servants, or employees, and must be represented by final judgments or settlements approved in writing by the Government. These liabilities are for -

(i) Loss of or damage to property (other than property owned, occupied, or used by the Contractor, rented to the Contractor, or in the care, custody, or control of the Contractor): or

(ii) Death or bodily injury.

(d) The Government's liability under paragraph (c) of this clause is limited to the amounts reflected in final judgments, or settlements approved in writing by the Government, but in no event to exceed the funds available under the Limitation of cost or Limitation of Funds clause

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of this contract. Nothing in this contract shall be construed as implying that, at a later date, the Government will request, or the Congress will appropriate, funds sufficient to meet any deficiencies.

(e) The Contractor shall not be reimbursed for liabilities (and expenses incidental to such liabilities) -

(1) For which the Contractor is otherwise responsible under the express terms of any clause specified in the Schedule or elsewhere in the contract:

(2) For which the Contractor has failed to insure or to maintain insurance as required by the Contracting Officer:
or

(3) That result from willful misconduct or lack of good faith on the part of the **Contractor's** directors, officers, managers, superintendents, or other representatives who have supervision or direction of -

(i) All or substantially all of the Contractor's business:

(ii) All or substantially all of the Contractor's operations at any one plant or separate location in which this contract is being performed; or

(iii) A separate and complete major industrial operation in connection with the performance of this contract.

(f) The provisions of paragraph (e) of this clause shall not restrict the right of the Contractor to be reimbursed for the cost of insurance maintained by the Contractor in connection with the performance of this contract, other than insurance required in accordance with this clause; provided, that such cost is allowable under the Allowable Cost and Payment clause of this contract.

(g) If any suit or action is filed or any claim is made against the Contractor, the cost and expense of which may be reimbursable to the Contractor under this contract, and the risk of which is then uninsured or is insured for less than the amount claimed, the Contractor shall -

(1) Immediately notify the Contracting Officer and promptly furnish copies of all pertinent papers received:

(2) Authorize Government **representatives** to collaborate with counsel for the insurance carrier in settling or

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defending the claim when the amount of the liability claimed exceeds the amount of coverage; and

(3) Authorize Government representatives to settle or defend the claim and to represent the Contractor in or to take charge of any litigation, if required by the Government, when the liability is not insured or covered by bond. The Contractor may, at its own expense, be associated with the Government representatives in any such claim or litigation.

(End of clause)

Alternate I (APR 1984). If the solicitation includes the provision at 52.228-6, Insurance-Immunity from Tort Liability, and the successful offeror represents in the offer that the offeror is partially immune from tort liability as a State agency or as a charitable institution, add the following paragraph (h) to the basic clause:

(h) Notwithstanding paragraphs (a) and (c) of this clause--

(1) The Government does not assume any liability to third persons, nor will the Government reimburse the Contractor for its liability to third persons, with respect to loss due to death, bodily injury, or damage to property resulting in any way from the performance of this contract or any subcontract under this contract: and

(2) The contractor need not provide or maintain insurance coverage as required by paragraph (a) of this clause: provided, that the Contractor may obtain any insurance coverage deemed necessary, subject to approval by the Contracting Officer as to form, amount, and duration. The Contractor shall be reimbursed for the cost of such insurance and, to the extent provided in paragraph (c) of this clause, to liabilities to third persons for which the contractor has obtained insurance coverage as provided in this paragraph, but for which such coverage is insufficient in amount.

(End **of** clause)

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Alternate II (APR 1984). If the solicitation includes the provision at 52.228-6, Insurance-Immunity from Tort Liability, and the successful offeror represents in the offer that the offeror is totally immune from tort liability as a State agency or as a charitable institution, substitute the following paragraphs (a) and (b) for paragraphs (a) through (g) of the basic clause:

(a) The Government does not assume any liability to third persons, nor will the Government reimburse the Contractor for its liability to third persons, with respect to loss due to death, bodily injury, or damage to property resulting in any way from the performance of this contract or any subcontract under this contract.

(b) If any suit or action is filed, or if any claim is made against the Contractor, the cost and expense of which may be reimbursable to the Contractor under this contract, the Contractor shall immediately notify the Contracting Officer and promptly furnish copies of all pertinent papers received by the Contractor. The Contractor shall, if required by the Government, authorize Government representatives to settle or defend the claim and to represent the Contractor in or take charge of any litigation. The Contractor may, at its own expense, be associated with the Government representatives in any such claim or litigation

(End of clause)

352.232-9 Withholding of Contract Payments.

Insert the following clause in all solicitations and contracts other than purchase orders:

WITHHOLDING OF CONTRACT PAYMENTS (APR 1984)

Notwithstanding any other payment provisions of this contract, failure of the Contractor to submit required reports when due or failure to perform or deliver required work, supplies, or services, will result in the withholding of payments under this contract unless such failure arises out of causes beyond the control, and without the fault or negligence of the Contractor as defined by the clause entitled "Excusable Delays" or **"Default"**, as applicable. The Government shall promptly notify the Contractor of its intention to withhold payment of any invoice or voucher submitted.

(End of clause)

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352.232-71 Cost Sharing.

The policy relative to cost sharing is set forth in 335.070.

(a) In contracts for which cost-sharing has been individually negotiated, the clause set forth in FAR 52.232-20 shall be used. Also, an article reading substantially as follows, which includes a cost-sharing formula agreed upon by the contracting officer and the contractor that provides for the ratio of cost-sharing for both the originally established estimated cost and any increase pursuant to the FAR clause, shall be included in the contract.

COST SHARING (APR 1984)

The Contractor agrees to share in the cost of the work hereunder to the extent of not less than (indicate percent of the total cost or dollar amount, etc.) and shall maintain records of all costs so contributed, as well as costs to be paid by the Government. Such records shall be subject to audit. Costs contributed by the Contractor shall not be charged to the Government under any other grant or contract (including allocation to other grants or contracts as part of an independent research and development program).

(End of clause)

(b) In contracts for which cost-sharing will be in accordance with a previously negotiated institutional agreement, the clause set forth in FAR 52.232-20 shall also be used. However, instead of specifying a cost-sharing formula, the following shall be included as a special provision.

COST SHARING UNDER INSTITUTIONAL AGREEMENT (APR 1984)

This contract is subject to an Institutional Cost-Sharing Agreement which became effective with respect to HHS research contracts on (date) and the Contractor agrees that the Government shall not bear the entire cost of the work hereunder.

(End of clause)

352.232-73 Method of Payment-Letter of Credit.

When authorized by an individual or blanket determination, findings, and authorization for advance payment, under a letter

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of credit, the following clause shall be used: (See 332.406 for further instructions regarding use of the clause.)

METHOD OF PAYMENT- LETTER OF CREDIT (APR 1984)

(a) The Contractor shall be paid with funds made available under the Federal Reserve *Letter of Credit* No. _____ established by _____ Department of Health and Human Services, against which the Contractor will withdraw funds pursuant to Federal Reserve Letter of Credit procedures contained in Treasury Department Circular 1075 (31 CFR Part 205).

(b) At the request of the Contractor and subject to the following conditions, the Government shall make an advance **payment**, or advance payments, from time to time, to the Contractor. No advance payment shall be made: (1) Without the approval of the office administering advance payments (hereinafter called the "Administering Office" and designated in paragraph (g)(2)) as to the financial necessity **therefor** (except in the case of educational institutions): (2) in an amount which, together with all advance payments made, exceeds the contract amount, and (3) without a properly certified invoice. The Contractor shall (1) initiate cash drawdowns only when actually needed for its disbursements, (2) report timely the cash disbursements and balances as required by the Administering Office, and (3) impose the same standards of timing and amount upon any subcontractors including the furnishing of reports of cash disbursements and balances. Failure to adhere to these material provisions will be considered an event under paragraph (f) of this clause.

(c) The funds drawn by the Contractor against the Federal Reserve Letter **of** Credit shall be only for current allowable expenditures necessary for the performance of this contract.

(d) When requested in writing by the Contracting Officer, the Contractor shall repay to the Government such part of the unliquidated balance of the advance payments as shall, in the opinion of the Contracting Officer, be in excess of the Contractor's current needs or in excess of the contract price.

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(e) If, upon completion or termination of this contract, all amounts obtained by the Contractor under this letter of credit have not been fully liquidated by authorized charges under the contract, the balance thereof shall be deducted from any sums otherwise due to the Contractor from the Government, and any excess funds shall be repaid by the Contractor to the Government upon demand.

(f) Upon the happening of any of the following events of default: (1) A finding by the Administering Office that the Contractor (i) has failed to observe any of the covenants, conditions, or warranties of these provisions or has failed to comply with any material provisions of this contract, or (ii) has so failed to make progress, or is in such unsatisfactory financial condition, as to endanger performance of this contract, **or** (iii) has allocated inventory to this contract substantially exceeding reasonable requirements, or (iv) is delinquent in payment of taxes or of the costs of performance of this contract in the ordinary course of business; (2) appointment of a trustee, receiver or liquidator for all or a substantial part of the Contractor's property, or institution of bankruptcy, reorganization, arrangement or liquidation proceedings by or against the Contractor; (3) service of any writ of attachment, levy of execution, or commencement of garnishment proceedings; or (4) the commission of an act of bankruptcy; the Government, without limiting any rights it may otherwise have, may, in its discretion and upon written notice to the Contractor, withhold further withdrawals under the Letter of Credit and withhold further payments on this contract. Payment can also be stopped for lack of submission of **timely** and accurate reports in accordance with contract requirements. Upon the continuance of any such events of default for a period of thirty (30) days after such written notice to the Contractor, the Government may, in its discretion, and without limiting any other rights which the Government **may** have, take the following additional actions as it may deem appropriate in the circumstances:

(1) Charge interest on advance payments outstanding during the period of any such default at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41, 80 Stat. 97 for the Renegotiation Board:

(2) Demand immediate repayment of the unliquidated balance of advance payments hereunder: **and, or**

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(3) Take possession of and, with or without advertisement, sell at public sale at which the Government may be purchaser, or at a private sale, all or any part of the property on which the Government has a lien under this contract, and after deducting any expenses incident to such sale, apply the net proceeds of such sale in reduction of the unliquidated balance of advance payments hereunder and in reduction of any other claims of the Government against the Contractor.

(g)(1) No interest shall be charged for advance payments made hereunder, except interest during a period of default as provided in paragraph (f)(2). The Contractor shall charge interest at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41 85 Stat. 97 for the Renegotiation Board on subadvances or downpayments to subcontractors and such interest will be credited to the account of the Government. However, interest need not be charged on subadvances on subcontracts with educational or research institutions provided such subcontracts are awarded without profit or fee for research, development or experimental work.

(2) The office administering advance payments is designated as _____.

(End of clause)

352.232-74 Estimated Cost and Fixed Fee-Incrementally Funded
Contract.

The following clause, or one reading substantially as it, shall be included in the Special Provisions of an incrementally funded contract:

CONSIDERATION-ESTIMATED COST AND FIXED FEE (APR 1984)

(a) It is estimated that the total cost to the Government for full performance of this contract will be \$ _____, of which the sum of \$ _____ represents the estimated reimbursable costs and \$ _____ represents the fixed-fee.

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(b) Total funds currently available for payment and allotted to this contract are \$ _____, of which \$ _____ represents the estimated reimbursable costs and \$ _____ represents the fixed-fee. For further provisions on funding, see the Limitation of Funds clause.

(c) It is estimated that the amount currently allotted will cover performance of Phase I which is scheduled to be completed by (date) _____.

(d) The Contracting Officer may allot additional funds to the contract without the concurrence of the Contractor.

(End of clause)

352.232-75 Incremental Funding.

The following provision shall be included in all requests for proposals whenever the use of incremental funding is contemplated:

INCREMENTAL FUNDING (APR 1984)

(a) Sufficient funds are not presently available to cover the total cost of the complete multiple year project described in this solicitation. However, it is the Government's intention to negotiate and award a contract using the incremental funding concepts described in the clause entitled Limitation of Funds. Under that clause, which will be included in the resultant contract, initial funds will be obligated under the contract to cover the first year of performance. Additional funds are intended to be allotted to the contract by contract modification, up to and including the full estimated cost of the contract, to accomplish the entire project. While it is the Government's intention to progressively fund this contract over the entire period of performance up to and including the full estimated cost, the Government will not be obligated to reimburse the Contractor for costs incurred in excess of the periodic allotments, nor will the Contractor be obligated to perform in excess of the amount allotted.

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(b) The Limitation of Funds clause to be included in the resultant contract shall supersede the Limitation of Cost clause found in the General Provisions.

(End of provision)

352.233-70 Litigation and Claims.

Insert the following clause in all solicitations and resultant cost-reimbursement contracts:

LITIGATION AND CLAIMS (APR 1984)

The Contractor shall give the Contracting Officer immediate notice in writing of (a) any action, including any proceeding before an administrative agency, filed against the Contractor arising out of the performance of this contract, including, but not limited to the performance of any subcontract hereunder; and (b) any claim against the Contractor the cost and expense of which is allowable under the clause entitled "Allowable Cost and Payment." Except as otherwise directed by the Contracting Officer, the Contractor shall furnish immediately to the Contracting Officer copies of all pertinent papers received by the Contractor with respect to such action or claim. To the extent not in conflict with any applicable policy of insurance, the Contractor may, with the Contracting Officer's approval, settle any such action or claim. If required by the Contracting Officer, the Contractor shall (a) effect an assignment and subrogation in favor of the Government of all the Contractor's rights and claims (except those against the Government) arising out of any such action or claim against the Contractor; and (b) authorize representatives of the Government to settle or defend any such action or claim and to represent the Contractor in, or to take charge of, any action. If the settlement or defense of an action or claim is undertaken by the Government, the Contractor shall furnish all reasonable assistance in effecting a settlement or asserting a defense. Where an action against the Contractor is not covered by a policy of insurance, the Contractor shall, with the approval of the Contracting Officer, proceed with the defense of the action in good faith. The Government shall not be liable for the expense of defending any action or for any costs resulting from the loss thereof to the extent that the Contractor would have been compensated by insurance which was required by law **or** regulation or by written direction of the

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Contracting Officer, but which the Contractor failed to secure through its own fault or negligence.

In any event, unless otherwise expressly provided in this contract, the Contractor shall not be reimbursed or indemnified by the Government for any liability loss, cost or expense, which the Contractor may incur or be subject to by reason of any loss, injury, or damage, to the person or to real or personal property of any third parties as may accrue during, or arise from, the performance of this contract.

(End of clause)

352.237-70 Consulting Services Reporting.

The contracting officer shall include the following clause in every contract for consulting services, as defined in the General Administration Manual Chapter 8-15 and as required by 337.270.

CONSULTING SERVICES REPORTING (APR 1984)

The Contractor shall set forth on the cover of every report submitted pursuant to this contract the following information: (a) Name and business address of the Contractor; (b) Contract number; (c) Contract dollar amount; (d) Whether the contract was awarded with or without full and open competition; (e) Name of the Department's **project** officer and complete office identification and address; and (f) Names of the managerial and professional personnel responsible for the content and preparation of the report.

(End of clause)

352.242-71 Final Decisions on Audit Findings.

Insert the following clause in all solicitations and resultant cost-reimbursement contracts.

FINAL DECISIONS ON AUDIT FINDINGS (APR 1984)

For the purpose of issuing final decisions under the Disputes clause of this contract concerning monetary audit findings, the Contracting Officer shall be that person with ultimate responsibility for making that decision in accordance with Chapter 1-105, Resolution of Audit Findings,

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of the Department's Grants Administration Manual.

(End of clause)

352.249-14 Excusable Delays.

Insert the following clause in all solicitations and resultant contracts other than purchase orders which do not have either a default or excusable delays clause.

EXCUSABLE DELAYS (APR 1984)

(a) Except with respect to failures of subcontractors, the Contractor shall not be considered to have failed in performance of this contract if such failure arises out of causes beyond the control and without the fault or negligence of the Contractor.

(b) Such causes may include, but are not restricted to, acts of God or of the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather, but in every case the failure to perform must be beyond the control and without the fault or negligence of the Contractor. If the failure to perform is caused by the failure of a subcontractor to perform, and if such failure arises out of causes beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either of them, the Contractor shall not be deemed to have failed in performance of the contract, unless: (1) The supplies or services to be furnished by the subcontractor were obtainable from other sources, (2) The Contracting Officer shall have ordered the Contractor in writing to procure such supplies or services from such other sources, and (3) The Contractor shall have failed to comply reasonably with such order. Upon request of the Contractor, the Contracting Officer shall ascertain the facts and extent of such failure and, if he/she shall determine that any failure to perform was occasioned by any one or more of the said causes, the delivery schedule shall be revised accordingly, subject to the rights of the Government under the termination clause hereof. (As used in this clause, the terms "subcontractor" and "subcontractors" mean subcontractor(s) at any tier.)

(End of clause)

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352,270-1 Accessibility of Meetings, Conferences, and Seminars
to Persons with Disabilities.

The following clause is to be used in accordance with 370.102:

ACCESSIBILITY OF MEETINGS, CONFERENCES, AND SEMINARS
TO PERSONS WITH DISABILITIES (APR 1984)

The Contractor agrees as follows:

(a) Planning. The Contractor will develop a plan to assure that any meeting, conference, or seminar held pursuant to this contract will meet or exceed the minimum accessibility standards set forth below. This plan shall include a provision for ascertaining the number and types of disabled individuals planning to attend the meeting, conference, or seminar. The plan shall be submitted to the project officer for approval prior to initiating action. (A consolidated or master plan for contracts requiring numerous meetings, conferences, or seminars may be submitted in lieu of separate plans.)

(b) Facilities. Any facility to be utilized for meetings, conferences, or seminars in performance of this contract shall be accessible to persons with disabilities. The Contractor shall determine, by an on-site inspection if necessary, that the following minimum accessibility requirements are met, or suitable modifications are made to meet these requirements, before the meeting:

(I) Parking. (i) Where parking is available on or adjacent to the site, one 12 wide space must be set aside for the care of each mobility impaired attendee. The space need not be permanently striped but may be temporarily marked by signs, ropes, or other means satisfactory to carry out this provision.

(ii) Where parking is not available on or adjacent to the site, valet parking or other alternate means to assist a person who has a mobility impairment may be used. Alternate means must be satisfactory in the judgement of the Government project officer.

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(2) Entrances. (i) **"Entrances"** shall include at least one accessible entrance from the street/sidewalk level, and at least one accessible entrance from any available parking facility.

(ii) The entrance shall be level or accessible by ramp with an incline that allows independent negotiation by a person in a wheelchair. In general, the slope of the incline shall be **no more** than **1"** rise per foot of ramp length (**1:12**).

(iii) Entrance doorways shall be at least **30"** in clear width and capable of operation by persons with disabilities. Revolving doors, regardless of **foldback** capability, will not meet this requirement.

(3) Meeting Rooms. (i) Meeting **room access** from the main entrance area must be level or at an independently negotiable incline (approximately **1:12**) and/or served by elevators from the main entrance level. All elevators shall be capable of accommodating a wheelchair **29"** wide by **45"** long.

(ii) Meeting rooms shall be on one level or, if on different levels, capable of being reached by elevators or by ramps that can be independently negotiated by a person in a wheelchair. Doorways to all meeting rooms shall be at **least 30"** in clear width.

(iii) The interior of the meeting room shall be on one level **or** ramped so **as** to be independently negotiable for a **person** in a wheelchair.

(iv) Stages, speaker platforms, etc. which are to be used by persons in wheelchairs must be accessible by ramps or lifts. When **used**, the **ramps may** not necessarily be independently negotiable if space does not permit. However, any slope over **1:12** must be approved by the project officer. Each case is to be judged on its own merits.

(v) If a meeting room with fixed seating is utilized, seating arrangements for persons in wheelchairs shall be made so that these persons are incorporated into the group rather than isolated on the perimeter of the group.

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(4) Restrooms. (i) Restrooms shall have level **access**, signs indicating accessibility, and doorways at least **30"** in clear width.

(ii) Sufficient turning space within restrooms shall be provided for independent use by a person in a wheelchair **29"** wide by **45"** long. A space **60"** by **60"** or **63"** by **56"** of unobstructed floor space as measured **12"** above the floor is acceptable by standard; other layouts will be accepted if it can be demonstrated that they are usable as indicated.

(iii) There will be a restroom for each sex or a unisex restroom with at least one toilet stall capable of accommodating a wheelchair **29" wide** by **45"** long (by standard, the minimum is **3'-0"** by **4'-8"**) with outswinging doors or privacy curtains. Wall mounted grab **bars** are required.

(iv) When separate restrooms have been set up for mobility impaired persons, they shall be located adjacent to the regular restrooms and shall be fully accessible.

(5) Eating Facilities. (i) Eating facilities in the meeting facility must be accessible under the same general guidelines as are applied to meeting rooms.

(ii) If the **eating facility** is a cafeteria, the food service area (cafeteria line) must allow sufficient room for independent wheelchair movement and accessibility to food for persons in wheelchairs, and cafeteria staff shall be available to assist disabled persons.

(6) Overnight Facilities. If overnight accommodations are required:

(i) Sufficient accessible guest rooms to accommodate **each** attendee who is disabled shall **be** located in the facility where the meeting, conference, or seminar is held, or in a facility housing the attendees which is conveniently located nearby, whichever is satisfactory to the project officer.

(ii) Overnight facilities shall provide for the same minimum accessibility requirements **as** the facility utilized for the meeting, conference, or seminar. In addition, guest room **access** from the main entrance area shall be level, ramped at an independently negotiable incline (**1:12**), and/or served by elevators capable of accommodating a wheelchair **29"** wide by **45"** long.

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(iii) Doorways to guest rooms, including the doorway to the bathroom, shall be at least 30" in clear width.

(iv) Bathrooms shall have wall mounted grab bars at the tub and water closet.

(v) Guest rooms for persons with a disability shall be provided at the same rate as a guest room for other attendees.

(7) Water Fountains. Water fountains shall be accessible to disabled persons, or have cup dispensers for use by persons in wheelchairs.

(c) Provisions of Services for Sensory Impaired Attendees.

(1) The Contractor, in planning the meeting, conference, or seminar, shall include in all announcements and other materials pertaining to the meeting, conference, or seminar a notice indicating that services will be made available to sensory impaired persons attending the meeting, if requested within five (5) days of the date of the meeting, conference, or seminar. The announcement(s) and other material(s) shall indicate that sensory impaired persons may contact a specific person(s), at a specific address and phone number(s), to make their service requirements known. The phone number(s) shall include a teletype number for the hearing impaired.

(2) The Contractor shall provide, at no cost to the individual, those services required by persons with sensory impairments to insure their complete participation in the meeting, conference, or seminar.

(3) As a minimum, when requested in advance, the Contractor shall provide the following services:

(i) For hearing impaired persons, qualified interpreters. Provisions will also be made for volume controlled phone lines and, if necessary, transportation to local teletype equipment to enable hearing impaired individuals to receive and send meeting related calls. If local teletype equipment is not available, the Contractor shall provide on site teletype equipment. Also, the meeting rooms will be adequately illuminated so signing by interpreters can be easily seen.

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(ii) For vision impaired persons, readers and/or cassette materials, as necessary, to enable full participation. Also, meeting rooms will be adequately illuminated.

(iii) Agenda and other conference material(s) shall be translated into a usable form for the visually and hearing impaired. Readers, braille translations, and/or tape recordings are all acceptable. These materials shall be available to sensory impaired individuals upon their arrival.

(4) The Contractor is responsible for making every effort to ascertain the number of sensory impaired individuals who plan to attend the meeting, conference, or seminar. However, if it can be determined that there will be no sensory impaired person (deaf and/or blind) in attendance, the provision of those services under paragraph (c) for the nonrepresented group, or groups, is not required.

(End of clause)

352.270-2 Indian Preference.

The following clause shall be used as prescribed in 370.202(a):

INDIAN PREFERENCE (APR 1984)

(a) The Contractor agrees to give preference in employment opportunities under this contract to Indians who can perform required work, regardless of age (subject to existing laws and regulations), sex, religion, or tribal affiliation. To the extent feasible and consistent with the efficient performance of this contract, the Contractor further agrees to give preference in employment and training opportunities under this contract to Indians who are not fully qualified to perform regardless of age (subject to existing laws and regulations), sex, religion, or tribal affiliation. The Contractor also agrees to give preference to Indian organizations and Indian-owned economic enterprises in the awarding of any subcontracts to the extent feasible and consistent with the efficient performance of this contract. The Contractor shall maintain statistical records as are necessary to indicate compliance with this paragraph.

(b) In connection with the Indian employment preference requirements of this clause the Contractor shall provide opportunities for training incident to such employment.

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Such training shall include on-the-job, classroom or apprenticeship training which is designed to increase the vocational effectiveness of an Indian employee.

(c) If the Contractor is unable to fill its employment and training opportunities after giving full consideration to Indians as required by this clause, those needs may be satisfied by selection of persons other than Indians in accordance with the clause of this contract entitled **"Equal Opportunity."**

(d) If no Indian organizations or Indian-owned economic enterprises are available under reasonable terms and conditions, including price, for awarding of subcontracts in connection with the work performed under this contract, the Contractor agrees to comply with the provisions of this contract involving utilization of small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, or labor surplus area concerns.

(e) As used in this clause:

(1) **"Indian"** means a person who is a member of an Indian Tribe. If the contractor has reason to doubt that a person seeking employment preference is an Indian, the Contractor shall grant the preference but shall require the individual to provide evidence within thirty (30) days from the Tribe concerned that the person is a member of that Tribe.

(2) **"Indian Tribe"** means an Indian Tribe, pueblo, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688; 43 U.S.C. 1601) which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(3) **"Indian organization"** means the governing body of any Indian Tribe or entity established or recognized by such governing body in accordance with the Indian Financing Act of 1974 (88 Stat. 77; 25 U.S.C. 1451); and

(4) **"Indian-owned economic enterprise"** means any Indian-owned commercial, industrial, or business activity established or organized for the purpose of profit,

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provided that such Indian ownership shall constitute not less than 51 percent of the enterprise, and that ownership shall encompass active operation and control of the enterprise.

(f) The Contractor agrees to include the provisions of this clause, including this paragraph (f), in each subcontract awarded at any tier under this contract.

(g) In the event of noncompliance with this clause, the Contracting Officer may terminate the contract in whole or in part or may impose any other sanctions authorized by law or by other provisions of the contract.

(End of clause)

352.270-3 Indian Preference Program.

The following clause shall be used as prescribed in 370.202(b):

INDIAN PREFERENCE PROGRAM (APR 1984)

(a) In addition to the requirements of the clause of this contract entitled "Indian Preference," the Contractor agrees to establish and conduct an Indian preference program which will expand opportunities for Indians to receive preference for employment and training in connection with the work to be performed under this contract, and which will **expand** the opportunities for Indian organizations and Indian-owned economic enterprises to receive a preference in the awarding of subcontracts. In this **connection**, the Contractor shall:

(1) **Designate a liaison** officer who will (i) Maintain **liaison** with the Government and the Tribe(s) on Indian preference **matters**; (ii) Supervise compliance with the provisions of this clause; and (iii) Administer the Contractor's Indian preference program.

(2) Advise its recruitment sources in writing and include **a** statement in all advertisements for employment that Indian applicants will be given preference in employment and training incident to such employment.

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(3) Not more than twenty (20) calendar days after award of the contract, post a written notice in the Tribal office of any reservations on which or near where the work under this contract is to be performed that sets forth the Contractor's employment needs and related training opportunities. The notice shall include the approximate numbers and types of employees needed; the approximate dates of employment; the experience or special skills required for employment, if any; training opportunities available; and other pertinent information necessary to advise prospective employees of any other employment requirements. The Contractor shall also request the Tribe(s) on or near whose reservation(s) the work is to be performed to provide assistance to the Contractor in filling its employment needs and training opportunities. The Contracting Officer will advise the Contractor of the name, location, and phone number of the Tribal officials to contact in regard to the posting of notices and requests for Tribal assistance.

(4) Establish and conduct a subcontracting program which **gives** preference to Indian organizations and Indian-owned **economic** enterprises as subcontractors and suppliers under this contract. The Contractor shall give public notice of existing subcontracting opportunities and, to the extent feasible and consistent with the efficient performance of this contract, shall solicit bids or proposals only from Indian organizations or Indian-owned economic enterprises. The Contractor shall request assistance and information on Indian firms qualified as suppliers or subcontractors from the Tribe(s) on or near whose reservation(s) the work under the contract is to be performed. The Contracting Officer will advise the contractor of the name, location, and phone number of the Tribal officials to be contacted in regard to the request for assistance and information. Public notices and solicitations for existing subcontracting opportunities shall provide an equitable opportunity for Indian firms to submit bids or proposals by including: (i) A clear description of the supplies or services required, including quantities, specifications, and delivery schedules which facilitate the participation of Indian firms; (ii) A statement indicating that preference will be given to Indian organizations and Indian-owned economic enterprises in accordance with section 7(b) of Public Law 93-638 (88 Stat. 2205; 25 U.S.C. **450e(b)**); (iii) Definitions for the terms "**Indian organization**" and "**Indian-owned economic enterprise**" as prescribed **under** the "Indian Preference" clause of this contract; (iv) A representation to be completed by the

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bidder or offeror that it is an Indian organization or Indian-owned economic enterprise: and (v) A closing date for receipt of bids or proposals which provides sufficient time for preparation and submission of a bid or proposal. If after soliciting bids or proposals from Indian organizations and Indian-owned economic enterprises, **no** responsive bid or acceptable proposal is received, the Contractor shall comply with the requirements of paragraph (d) of the "Indian Preference" clause of this contract. If one or more responsive bids or acceptable proposals are received, award shall be made to the low responsible bidder or acceptable offeror if the price is determined to be reasonable. If the low responsive bid or acceptable proposal is determined to be unreasonable as to price, the Contractor shall attempt to negotiate a reasonable price and award a subcontract. If a reasonable price cannot be agreed upon, the Contractor shall comply with the requirements of paragraph (d) of the "Indian Preference** clause of this contract.

(5) Maintain written records under this contract which indicate: (i) The numbers of Indians seeking employment for each employment position available under this contract; (ii) the number and types of positions filled by Indians and non-Indians, and the total number **of** Indians employed under this contract; (iii) For those positions where there are both Indian and non-Indian applicants, and a non-Indian is selected for employment, the reason(s) why the Indian applicant **was** not selected; (iv) Actions taken to give **preference** to Indian organizations and Indian-owned economic enterprises for subcontracting opportunities which exist under this contract; (v) Reasons why preference **was** not given to Indian firms as subcontractors **or** suppliers for **each** requirement where it was determined by the Contractor that such preference would not be consistent with the efficient performance of the contract; and (vi) The number of Indian organizations and Indian-owned economic enterprises contacted, and the number receiving subcontract awards under this contract.

(6) Submit to the Contracting Officer for approval a quarterly report which summarizes the Contractor's Indian preference program and indicates the number and types of available positions filled by Indians and non-Indians, and the dollar amounts of all subcontracts awarded to Indian

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organizations and Indian-owned economic enterprises, and to all other firms.

(7) Maintain records pursuant to this clause and keep them available for review by the Government until expiration of one (1) year after final payment under this contract, or for such longer period as may be required by any other clause of this contract or by applicable law or regulation.

(b) For purposes of this clause, the following definitions of terms shall apply:

(1) The terms "**Indian**," "Indian Tribe," "Indian Organization," and "Indian-owned economic enterprise" are defined in the clause of this contract entitled "**Indian Preference**."

(2) "Indian reservation" includes Indian reservations, public domain Indian Allotments, former Indian reservations in Oklahoma, and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act (85 Stat. 688; 43 U.S.C. 1601 et seq.)

(3) "**On** or near an Indian Reservation" means on a reservation or reservations or within that area surrounding an Indian reservation(s) where a person seeking employment could reasonably be expected to commute to and from in the course of a work day.

(c) Nothing in the requirements of this clause shall be interpreted to preclude Indian Tribes from independently developing and enforcing their own Indian preference requirements. Such requirements must not conflict with any Federal statutory or regulatory requirement dealing with the award and administration of contracts.

(d) The Contractor agrees to include the provisions of this clause, including this paragraph (d), in each subcontract awarded at any tier under this contract and to notify the Contracting Officer of such subcontracts.

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(e) In the event of noncompliance with this clause, the Contracting Officer may terminate the contract in whole or in part or may impose any other sanctions authorized by law or by other provisions of the contract.

(End of clause)

352.270-4 Pricing of Adjustments.

Insert the following clause in all solicitations and resultant fixed-priced contracts other than purchase orders.

PRICING OF ADJUSTMENTS (APR 1984)

When costs are a factor in determination of a contract price adjustment pursuant to the "Changes" clause or any provision of this contract, such costs shall be determined in accordance with **the** applicable cost principles and procedures set forth below:

Principles

Types of organizations

- | | |
|--|------------------------------|
| (a) Subpart 31.2 of the Federal Acquisition Regulation | Commercial |
| (b) Subpart 31.3 of the Federal Acquisition Regulation | Educational |
| (c) Subpart 31.6 of the Federal Acquisition Regulation | State or local governments |
| (d) 45 CFR Part 74 Appendix E | Hospitals |
| (e) Subpart 31.7 of the Federal Acquisition Regulation | Other nonprofit institutions |

(End of clause)

352.270-5 Key Personnel.

Insert the following clause in all solicitations and resultant cost-reimbursement contracts.

Texts of Provisions and Clauses

KEY PERSONNEL (APR 1984)

The personnel specified in this contract are considered to be essential to the work being performed hereunder. Prior to diverting any of the specified individuals to other programs, the Contractor shall notify the Contracting Officer reasonably in advance and shall submit justification (including proposed substitutions) in sufficient detail to permit evaluation of the impact on the program. No diversion shall be made by the Contractor without the written consent of the Contracting Officer: provided, that the Contracting Officer may ratify in writing such diversion and such ratification shall constitute the consent of the Contracting Officer required by this clause. The contract may be amended from time to time during the course of the Contract to either add or delete personnel, as appropriate.

(End of clause)

352.270-6 Publications and Publicity.

Insert the following clause in all solicitations and resultant contracts.

PUBLICATIONS AND PUBLICITY (JUL 1991)

(a) Unless otherwise specified in this contract, the Contractor is encouraged to publish the results of its work under this contract. A copy of each article submitted by the Contractor for publication shall be promptly sent to the Project Officer. The Contractor shall also inform the Project Officer when the article or other publication is published, and furnish a copy of it as finally published.

(b) The Contractor shall include in any publication resulting from work performed under this contract a disclaimer reading as follows:

The content of this publication does not necessarily reflect the views or policies of the Department of Health and Human Services, nor does mention of trade names, commercial products, or organizations imply endorsement by the U.S. Government.

(End of Clause)

Texts of Provisions and Clauses

352.270-7 Paperwork Reduction Act.

Insert the following clause in all solicitations and contracts.

PAPERWORK REDUCTION ACT (APR 1984)

(a) In the event that it subsequently becomes a contractual requirement to collect or record information calling either for answers to identical questions from 10 or more persons other than Federal employees, or information from Federal employees which is outside the scope of their employment, for use by the Federal government or disclosure to third parties, the Paperwork Reduction Act of 1980 (Pub. L. 96-511) shall apply to this contract. No plan, questionnaire, interview guide or other similar device for collecting information (whether repetitive or single-time) may be used without first obtaining clearance from the Assistant Secretary for Management and Budget (ASMB) within the Department of Health and Human Services (HHS) and the Office of Management and Budget (**OMB**). Contractors and Project Officers should be guided by the provisions of 5 CFR Part 1320, Controlling Paperwork Burdens on the Public, and seek the advice of the HHS operating division or Office of the Secretary Reports Clearance Officer to determine the procedures for acquiring ASMB and OMB clearance.

(b) The Contractor shall obtain the required ASMB and OMB clearance through the Project Officer before expending any funds or making public contacts for the collection of data. The authority to expend funds and proceed with the collection of information shall be in writing by the Contracting Officer. The Contractor must plan at least **120** days for ASMB and OMB clearance. Excessive delay caused by the Government which arises out of causes beyond the control and without the fault or negligence of the Contractor will be considered in accordance with the Excusable Delays or Default clause of this contract.

(End of clause)

Texts of Provisions and Clauses

(d) If no Indian organizations or Indian-owned economic enterprises are available under reasonable terms and conditions, including price, for awarding of subcontracts in connection with the work performed under this contract, the Contractor agrees to comply with the provisions of this contract involving utilization of small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, or labor surplus are concerns.

(e) As used in this clause:

(1) **"Indian"** means a person who is a member of an Indian Tribe. If the Contractor has reason to doubt that a person seeking employment preference is an Indian, the Contractor shall grant the preference but shall require the individual to provide evidence within thirty (30) days from the Tribe concerned that the person is a member of that Tribe.

(2) **"Indian Tribe"** means an Indian Tribe, pueblo, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688; 43 U.S.C. 1601) which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(3) **"Indian organization"** means the governing body of any Indian Tribe or entity established or recognized by such governing body in accordance with the Indian Financing Act of 1974 (88 Stat. 77; 25 U.S.C. 1451); and

(4) **"Indian-owned economic enterprise"** means any Indian-owned commercial, industrial, or business activity established or organized for the purpose of profit, provided that such Indian ownership shall constitute not less than 51 percent of the enterprise, and that ownership shall encompass active operation and control of the enterprise.

Texts of Provisions and Clauses

(f) The Contractor agrees to include the provisions of this clause, including this paragraph (f), in each subcontract awarded at any tier under this contract.

(g) In the event of noncompliance with this clause, the Contracting Officer may terminate the contract in whole or in part or may impose any other sanctions authorized by law or by other provisions of the contract.

(End of clause)

352.270-3 Indian Preference Program.

The following clause shall be used as prescribed in 370.202(b):

INDIAN PREFERENCE PROGRAM (APR 1984)

(a) In addition to the requirements of the clause of this contract entitled "Indian Preference," the Contractor agrees to establish and conduct an Indian preference program which will expand opportunities for Indians to receive preference for employment and training in connection with the work to be performed under this contract, and which will expand the opportunities for Indian organizations and Indian-owned economic enterprises to receive a preference in the awarding of subcontracts. In this connection, the Contractor shall:

(1) Designate a liaison officer who will (i) Maintain liaison with the Government and the Tribe(s) on Indian preference matters; (ii) Supervise compliance with the provisions of this clause; and (iii) Administer the Contractor's Indian preference program.

(2) Advise its recruitment sources in writing and include a statement in all advertisements for employment that Indian applicants will be given preference in employment and training incident to such employment.

Texts of Provisions and Clauses

(3) Not more than twenty (20) calendar days after award of the contract, post a written notice in the Tribal office of any reservations on which or near where the work under this contract is to be performed that sets forth the Contractor's employment needs and related training opportunities. The notice shall include the approximate numbers and types of employees needed; the approximate dates of employment; the experience or special skills required for employment, if any; training opportunities available; and other pertinent information necessary to advise prospective employees of any other employment requirements. The Contractor shall also request the Tribe(s) on or near whose **reservation(s)** the work is to be performed to provide assistance to the Contractor in filling its employment needs and training opportunities. The Contracting Officer will advise the Contractor of the name, location, and phone number of the Tribal officials to contact in regard to the posting of notices and requests **for** Tribal assistance.

(4) Establish and conduct a subcontracting program which gives preference to Indian organizations and Indian-owned economic enterprises as subcontractors and suppliers under this contract. The Contractor shall give public notice **of** existing subcontracting opportunities and, to the extent feasible and consistent with the efficient performance of this contract, shall solicit bids or proposals only from Indian organizations or Indian-owned economic enterprises. The Contractor shall request assistance and information on Indian firms qualified as suppliers or subcontractors from the Tribe(s) on or near whose **reservation(s)** the work under the contract is to be performed. The Contracting Officer will advise the Contractor of the name, location, and phone number of the Tribal officials to be contacted in regard to the request for assistance and information. Public notices and solicitations for existing subcontracting opportunities shall provide an **equitable** opportunity for Indian firms to submit bids or proposals by including: (i) A clear description of the supplies or services required, including quantities, specifications, and delivery schedules which facilitate the participation of Indian firms: (ii) A statement indicating that preference will **be** given to Indian organizations and Indian-owned economic enterprises in

Texts of Provisions and Clauses

accordance with section 7(b) of Public Law 93-638 (88 Stat. 2205; 25 U.S.C. 450e(b)); (iii) **Definitions for the terms** "Indian organization" and "Indian-owned economic enterprise" as prescribed under the "Indian Preference" clause of this contract; (iv) A representation to be completed by the bidder or offeror that it is an Indian organization or Indian-owned economic enterprise; and (v) A closing date for receipt of bids or proposals which provides sufficient time for preparation and submission of a bid or proposal. If after soliciting bids or proposals from Indian organizations and Indian-owned economic enterprises, no responsive bid or acceptable proposal is received, the Contractor shall comply with the requirements of paragraph (d) of the **"Indian Preference"** clause of this contract. If one or more responsive bids or acceptable proposals are received, award shall be made to the low responsible bidder or acceptable offeror if the price is determined to be reasonable. If the low responsive bid or acceptable proposal is determined to be unreasonable as to price, the Contractor shall attempt to negotiate a reasonable price and award a subcontract. If a reasonable price cannot be agreed upon, the Contractor shall comply with the requirements of paragraph (d) of the "Indian Preference*" clause of this contract.

(5) Maintain written records under this contract which indicate: (i) The numbers of Indians seeking employment for each employment position available under this contract; (ii) the number and types of positions filled by Indians and non-Indians, and the total number of Indians employed under this contract; (iii) For those positions where there are both Indian and non-Indian applicants, and a non-Indian is selected for employment, the reason(s) why the Indian applicant was not selected; (iv) Actions taken to give preference to Indian organizations and Indian-owned economic enterprises for subcontracting opportunities which exist under this contract; (v) Reasons why preference was not given to Indian firms as subcontractors or suppliers for each requirement where it was determined by the Contractor that such preference would not be consistent with the efficient performance of the contract; and (vi).The number of Indian organizations and Indian-owned economic enterprises contacted, and

Texts of Provisions and Clauses

the number receiving subcontract awards under this contract.

(6) Submit to the Contracting Officer for approval a quarterly report which summarizes the Contractor's Indian preference program and indicates the number and types of available positions filled by Indians and **non-Indians**, and the dollar amounts of all subcontracts awarded to Indian organizations and Indian-owned economic enterprises, and to all other firms.

(7) Maintain records pursuant to this clause and keep them available for review by the Government until expiration of one (1) year after final payment under this contract, or for such longer period as may be required by any other clause of this contract or by applicable law or regulation.

(b) For purposes of this clause, the following definitions of terms shall apply.

(1) The terms **"Indian," "Indian Tribe," "Indian Organization,"** and **"Indian-owned economic enterprise"** are defined in the clause **of** this contract entitled **"Indian Preference."**

(2) **"Indian reservation"** includes Indian reservations, public domain Indian Allotments, former Indian reservations in Oklahoma, and land held by incorporated Native **groups**, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act (85 Stat. 688; 43 U.S.C. 1601 et seq.)

(3) **"On or near an Indian Reservation"** means on a reservation or reservations or within that area surrounding an Indian reservation(s) where a person seeking employment could reasonably be expected to commute to and from in the course of a work day.

(c) Nothing in the requirements of this clause shall be interpreted to preclude Indian Tribes from independently developing and enforcing their own Indian preference requirements. Such requirements must not conflict with any Federal statutory or regulatory requirement dealing with the award and administration of contracts.

Texts of Provisions and Clauses

(d) The Contractor agrees to include the provisions of this clause, including this paragraph (d), in each subcontract awarded at any tier under this contract and to notify the Contracting Officer of such subcontracts.

(e) In the event of noncompliance with this clause, the Contracting Officer may terminate the contract in whole or in part or may impose any other sanctions authorized by law or by other provisions of the contract.

(End of clause)

352.270-4 Pricing of Adjustments.

Insert the following clause in all solicitations **and** resultant fixed-price contracts other than purchase orders.

PRICING OF ADJUSTMENTS (APR 1984)

When costs are a factor in determination of a contract price adjustment pursuant to the **"Changes"** clause or any provision of this **contract**, **such costs shall** be determined in accordance with the applicable cost principles and procedures set forth below:

PRINCIPLES

TYPES OF ORGANIZATIONS

(a) Subpart 31.2
of the Federal
Acquisition
Regulation.

Commercial.

(b) Subpart 31.3
of the Federal
Acquisition
Regulation.

Educational.

(c) Subpart 31.6 of
the Federal
Acquisition
Regulation.

State or local
governments.

(d) 45 CFR Part 74
Appendix E

Hospitals.

Texts of Provisions and Clauses

PRINCIPLES

TYPES OF ORGANIZATIONS

(e) Subpart 31.7
of the Federal
Acquisition
Regulation.

Other nonprofit
institutions.

(End of clause)

352.270-s Key Personnel.

Insert the following clause in all solicitations and
resultant cost-reimbursement contracts.

KEY PERSONNEL (APR 1984)

The personnel specified in this contract are considered to be essential to the work being performed hereunder. Prior to diverting any of the specified individuals to other programs, the Contractor shall notify the Contracting Officer reasonably in advance and shall submit justification (including proposed substitutions) in sufficient detail to permit evaluation of the impact on the program. No diversion shall be made by the Contractor without the written consent of the Contracting Officer; provided, that the Contracting Officer **may** ratify in writing such diversion and such ratification shall constitute the consent of the Contracting Officer required by this clause. The contract may be amended from time to time during the course of the contract to either add or delete personnel, as appropriate.

(End of clause)

352.270-7 Paperwork Reduction Act.

Insert the following clause in all solicitations and contracts.

PAPERWORK REDUCTION ACT (APR 1984)

(a) In the even that it subsequently becomes a contractual requirement to collect or record information calling either for answers to identical **questions** from 10 or more persons other than Federal employees, or information from Federal employees which is outside the 'scope of their employment, for use by

Texts of Provisions and Clauses

the Federal government or disclosure to third parties, the Paperwork Reduction Act of 1980 (Pub. L. 96-511) shall apply to this contract. No plan, questionnaire, interview guide or other similar device for collecting information (whether repetitive or single-time) may be used without first obtaining clearance from the Assistant Secretary for Management and Budget (ASMB) within the Department of Health and Human Services (HHS) and the Office of Management and Budget (OMB). Contractors and Project Officers should be guided by the provisions of 5 CFR 1320, Controlling Paperwork Burdens on the Public, and seek the advice of the HHS operating division or Office of the Secretary Reports Clearance Officer **to** determine the procedures for acquiring ASMB and OMB clearance.

(b) The Contractor shall obtain the required ASMB and OMB clearance through the Project Officer before expending any funds or making public contacts for the collection of data. The authority to expend funds and proceed with the collection of information shall be in writing by the Contracting Officer. The Contractor must plan at least 120 days for ASMB and OMB clearance. Excessive delay caused by the Government which arises out of causes beyond the control and without the fault or negligence of the Contractor will be considered in accordance with the Excusable Delays or Default clause of this contract.

(End of Clause)

Part 353

Forms

Subpart 353.3 • Illustrations of Forms

Section

353.370-393

353.370-674

Form HHS 393, Purchase/Service/Stock Requisition.

Form HHS 674, Structured Approach Profit/Fee
Objective.

Subpart 353.3

Illustration of Forms

353.370-393

Form HHS 393, Purchase/Service/Stock Requisition.

DEPARTMENT OF HEALTH AND HUMAN SERVICES PURCHASE/SERVICE/STOCK REQUISITION					
SFA and Call No _____				REQUISITION NUMBER <div style="border: 1px solid black; padding: 2px; text-align: center; font-weight: bold;">511163</div>	
TO _____		REQUEST FOR <input type="checkbox"/> PURCHASE <input type="checkbox"/> SERVICE <input type="checkbox"/> STOCK ISSUE <input type="checkbox"/> RENTAL/LEASE			
REQUESTING ORGANIZATION _____		CUSTODIAL AREA _____		DATE _____	OBJECT CLASS _____
FOR REFERENCE CALL _____		EXTENSION _____		APPROPRIATION _____	
DELIVER TO _____				CAN _____	
				DATE REQUIRED _____	
ITEM NO.	DESCRIPTION (INCLUDE STOCK NUMBER, MODEL/PART NO., ETC.)	QUANTITY REQUIRED	UNIT OF MEASURE	COST	
				UNIT	TOTAL
I certify that the property/service requested are required for Government business, and are not available from sources of routine supply.		FUNDS AVAILABLE (Signature/Title) _____		DATE _____	TOTAL _____
REQUESTED BY (Signature/Title)* _____		DATE _____	RECEIVING OFFICIAL - I certify that the quantities indicated in the "Quantity Required" column above have been ordered in total or as indicated.		
RECOMMEND APPROVAL (Signature/Title)* _____		DATE _____	RECEIVING OFFICIAL (Signature/Title) _____		DATE _____
APPROVED BY (Signature/Title)* _____		DATE _____	ORDER NO (PO, DO, FEDSTRIP, ETC.) _____		ORDER DATE _____
PROPERTY MANAGEMENT OFFICER (Signature)* _____		DATE _____	VOUCHER NO _____		VOUCHER DATE _____
HHS - 393 (Rev. 4/81)					

Illustration of Forms

353.370-674 Form HHS 674, Structured Approach Profit/Fee Objective.

Structured Approach Profit/Fee Objective				
CONTRACTOR			OFF/CONTRACT NO.	
BUSINESS UNIT			CONTRACT TYPE	
ADDRESS				
CONTRACTOR EFFORT				
1. COST CATEGORY	GOVERNMENT'S COST OBJECTIVE (a)	WEIGHT RANGE (b)	ASSIGNED WEIGHT (c)	WEIGHTED PROFIT/FEE (d) = (a) x (c)
MATERIAL ACQUISITION		18 to 58		
DIRECT LABOR		48 to 158		
OVERHEAD		48 to 98		
OTHER COSTS		18 to 58		
GENERAL MANAGEMENT (G & A)		48 to 88		
1 A TOTAL				
2 OTHER FACTORS				
FACTOR	MEASUREMENT BASE (a)	WEIGHT RANGE (b)	ASSIGNED WEIGHT (c)	WEIGHTED PROFIT/FEE 1 A (a) x (c) (d)
COST RISK	TOTAL COST OBJECTIVE 1 A (a)	28 to 38		
INVESTMENT		28 to 38		
PERFORMANCE		28 to 38		
SOCIO ECONOMIC PROGRAMS		28 to 38		
SPECIAL SITUATIONS		28 to 38		
2 A TOTAL OTHER FACTORS				
3 SUBTOTAL PROFIT/FEE LINES 1 A & 2 A				
4 LESS FACILITIES CAPITAL COST OF MONEY				
5 TOTAL PROFIT/FEE OBJECTIVE, LINE 3 - 4				

Part 370

Special Programs Affecting Acquisition

Subpart 370.1 - Accessibility of Meetings, Con-
ferences, and Seminars to Persons
with Disabilities

Section
370.101
370.102

Policy.
Responsibilities.

Subpart 370.2 - Indian **Prerference** in Employment,
Training, and Subcontracting
Opportunities

370.201
370.202
370.203
370.204
70.205

Statutory requirements.
Applicability.
Definitions.
Compliance enforcement.
Tribal preference requirements.

Subpart 370.1

Accessibility of **Meetings**, Conferences,
and **Seminars** to Persons with Disabilities

370.101 Policy.

(a) It is the policy of HHS that all meetings, conferences, and seminars be **accessible** to individuals with disabilities. For the purposes of this policy, accessibility is defined as both physical access to meeting, conference, and seminar sites, and aids and services to enable individuals with sensory disabilities to fully participate **in meetings**, conferences, and seminars.

(b) In regard to acquisition, the **policy** is applicable to all contracts where the **statement of work** requires the contractor to conduct meetings, conferences, or seminars that are open to the public or involve **HHS** personnel, but not to ad hoc meetings that may be necessary or incidental to contract **performance**.

370.102 Responsibilities.

(a) The contracting officer shall **include** the *clause* in 352.270-1 in every solicitation and resulting contract when the **statement** of work requires the contractor to conduct meetings, conferences, or seminars in accordance **with** 370.101(b).

(b) The project officer shall be responsible for obtaining, **review-**
ing, and approving the contractor's plan, which **is** to be submitted in response to paragraph (a) of the contract clause in 352.270-1. A consolidated or master plan for contracts requiring numerous meetings, conferences, or seminars **will** be acceptable. The project officer, prior to approving the plan, shall consult with the Office of Engineering Services serving the region where the meeting, conference, or seminar is to be held, to assure that the contractor's plan **meets** the accessibility requirements of the contract clause. The Office of Engineering Services shall make a determination on the adequacy of the contractor's plan, and notify the project officer, in writing, within ten **(10)** working days of receiving the request from the project officer.

Subpart 370.2

Indian Preference in Employment, Training,
and Subcontracting Opportunities

370.201 Statutory requirements.

Section 7(b) of the Indian Self-Determination and Education Assistance Act, Public Law 93-638, 88 Stat. 2205; **25 U.S.C. 450e(b)**, requires:

"Any contract, subcontract, grant, or **subgrant** pursuant to this Act, the Act of April 16, 1934 (48 Stat. **596**), as amended, or **any** other Act authorizing Federal contracts with or grants to Indian organizations or for the benefit of Indians, shall require that **to the greatest** extent feasible -

(1) Preferences and opportunities for training and employment in connection with the administration of such **contracts or grants shall** be given to Indians; and

(2) Preference in **this award of subcontracts** and subgrants in connection with the administration of such contracts or grants shall be given to Indian organizations and to Indian-owned economic enterprises **as** defined in section 3 of the Indian Financing Act of 1974 (88 Stat. **77**)."

370.202 Applicability.

The **Indian** Preference clause set forth in **352.270-2** and the Indian Preference Program clause set forth in 352.270-3 have been developed to implement section 7(b) of Public Law 93-638 **for all** activities of the Department. The **clauses** shall be used by any affected departmental contracting activity as follows, **except** solicitations issued **and contracts awarded** pursuant to Title I of Public Law 93-638 (25 **U.S.C.450** et seq.) are exempted:

(a) The Indian Preference **clause (352.270-2)** shall be included in each solicitation and resultant contract, regardless of dollar amount:

(1) When the contract is to be awarded pursuant to an **act** specifically authorizing contracts with Indian organizations; or

Indian Preference in Employment, Training,
and Subcontracting Opportunities

(2) Where the work to be performed under the contract is specifically for the benefit of Indians and is in addition to any incidental benefits which might otherwise **accrue to** the general public.

(b) The Indian Preference Program clause (352.270-3) shall be included in each solicitation and resultant contract when:

(1) The dollar amount of the acquisition is expected to equal or exceed \$50,000 for nonconstruction **work or \$100,000** for construction work;

(2) The Indian Preference clause is to be included in the solicitation and resultant contract; and

(3) The determination is made, prior to solicitation, that the work to be performed under the resultant contract will take place in whole or in substantial part on or near an Indian reservation(s). In addition, the Indian Preference Program **clause** may be included in any solicitation and resultant contract below the \$50,000 **or** \$100,000 level for nonconstruction or construction contracts, respectively, but which meet the requirements of paragraphs (2) and (3) of this **370.202(b)**, and, in the opinion of the contracting activity, offer substantial opportunities for Indian employment, training, and subcontracting.

370.203 Definitions.

For purposes of this Subpart 370.2, the **following** definitions shall apply:

(a) "Indian" means a person who is a member of an Indian Tribe. If the contractor has reason to doubt that a person seeking employment preference is an Indian, the contractor shall grant the preference but shall require the individual to provide evidence within thirty (30) days from the Tribe concerned that the person is a member of that Tribe.

(b) "Indian Tribe" means an Indian Tribe, pueblo, band, nation, **or** other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims

Indian Preference in Employment, **Training**,
and Subcontracting Opportunities

Settlement Act (85 Stat. **688**; 43 U.S.C. **1601**) which is recognized as eligible for the special programs and services provided by the United States to Indians **because** of their status as Indians.

(c) "Indian organization" means the governing body of any Indian Tribe or entity established or recognized **by** such governing body in accordance with the Indian Financing Act of **1974 (88 Stat. 77; 25 U.S.C. 1451)**.

(d) "Indian-owned economic enterprise" means any **Indian-owned commercial**, industrial, or business activity established or organized for the purpose of profit, provided that such Indian ownership shall constitute not less than 51 percent of the enterprise, and that ownership shall encompass active operation and control.

(e) "Indian reservation" includes Indian reservations, public domain Indian allotments, **former** Indian reservations in Oklahoma, and land held by incorporated Native groups, regional corporations, and village corporations under the provisions of the Alaska Native Claims Settlement Act (**85 Stat. 688; 43 U.S.C. 1601 et seq.**)

(f) "On or near an Indian Reservation" means on a reservation or reservations or within that area surrounding an Indian **reservation(s)** where a person seeking employment could reasonably be expected to commute to and from in the course **of a work day**.

370.294 Compliance enforcement.

(a) The concerned contracting activity shall **be** responsible for conducting periodic reviews to insure contractor compliance with the requirements of the clauses set forth in **352.270-2** and 352.270-3. These reviews may be conducted with the **assistance of** the Indian Tribe(s) concerned.

(b) Complaints of noncompliance with the requirements of the clauses set forth in **352.270-2** and 352.270-3 which are filed in writing with the contracting activity shall be promptly investigated and resolved by the contracting officer.

Indian Preference in Employment, Training,
and Subcontracting Opportunities

370.205 Tribal preference requirements.

(a) where the work under a contract is to be performed on an Indian reservation, the contracting activity **may** supplement the clause set forth in **352.270-3** by adding specific **Indian** preference requirements of the Tribe on whose reservation the work is to **be** performed. The supplemental requirements shall **be** jointly developed for the contract by the contracting activity and the Tribe. Supplemental preference requirements **must** represent a further implementation of the requirements of section **7(b)** of Public Law 93-638 and must be approved **by** the affected program director and approved for legal sufficiency **by** the Business and Administrative Law Division, OGC, or a regional attorney before being added to a solicitation and resultant contract. Any Supplemental preference requirements to **be** added to the clause in 352.270-3 shall **be** included in the solicitation and clearly identified in order to ensure uniform understanding of the **additional** requirements by all prospective bidders or offerors.

(b) Nothing in these regulations shall be interpreted to preclude Tribes from independently developing and enforcing their own tribal preference requirements. Such independently developed tribal preference requirements shall not, except as provided in paragraph (a) above, become a requirement in contracts covered under this Subpart 370.2, and **must not** conflict with any Federal **statutory** or regulatory requirement concerning the award and administration of contracts.

APPENDIX A

Single Letter of Credit Recipients and Central Point Addresses

<u>State</u>	<u>Organization and Payee Number</u>	<u>Recipient CRS-EIN*</u>	<u>Letter of Credit</u>
Alabama	University of Alabama Medical Center 1-636005396-A4	1-636001138-A2 1-636001138-A3 1-636001138-A4 1-636001138-A5 1-636001138-B1 1-636005396-A3 1-636005396-A4 1-636005396-A5 1-636005396-A6 1-636005396-A7 1-636005396-A8	75080110
	Director Office of Grants and Contracts Accounting University of Alabama University Station Birmingham, Alabama 35296 University of Alabama 1-636001138-A1	1-636001138-A1 1-636001138-A6 1-636001138-A7 1-636001138-A8 1-636001138-A9 1-636001138-B2 1-636001138-83 1-636001138-84	75080115
	Comptroller University of Alabama P.O. Box M University, Alabama		

*Central Registry-System Entity Identification Number (CRS-EIN)

CRS-EIN is a twelve digit number used to identify a recipient organization/individual in the **HHS** Central Registry System (CRS). . This system utilizes a standard identification number within HHS to identify recipients of Federal assistance-like programs. The first digit identifies whether **the** recipient is an organization (1) or individual (2). The next nine (9) digits uniquely associate the organization/individual to an Employer Identification Number assigned by the Internal Revenue Service in the case of an organization, or a Social Security Number **assigned** by the Social Security Administration in the case of an individual. A two character suffix code is assigned by the Central Registry System, HHS, to identify component levels within the recipient organization, such as: School of Medicine, Research Division, Department of Biology, etc. A suffix is not applied to a Social Security Number since that number is unique to each individual.

Alabama	Southern Research Institute I-630288868-A2	1-630288868-A1 1-630288868-A2	75083532
	Financial Officer southern Research Institute 2000 - 9th Avenue, south Birmingham, Alabama 35205		
Alaska	State of Alaska 1-900001517-A1	1-000700389-A1 1-926001185-A2 1-926001185-A3 1-926001185-A4 1-926001185-A5 1-926001185-A7	75080021
	Director Division of Finance Department of Administration Pouch C Juneau, Alaska 99801	1-926001185-B1 1-926001185-82 1-926001185-B3 1-926001185-86 1-926001185-87 1-926001185-88 1-926001185-B9 1-926001185-C1 1-926001185-C2	
Arizona	State of Arizona 1-866004791-B7	1-866004791-A1 1-866004791-A2 1-866004791-A3	75080628
	State Treasurer's Office State Capitol Phoenix, Arizona 85007	1-8660047910A4 1-866004791-A5 1-866004791-A6 1-866004791-A7 1-866004791-A8 1-866004791-A9 1-866004791-82 1-866004791-83 1-866004791-B7 1-866004791-B8 1-866004791-C2 1-866004791-C5 1-866004791X7 1-866004791-C8 1-866004791-C9 1-866004791-D1 1-866004791-D2 1-866004791-D3	

Arizona

1-866004791-D5
 1-866004791-D6
 1-866004791-D7
 1-866004791-D8
 1-866004791-D9
 1-866004791-E3
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Cali-
fornia

County of San Diego
1-95000934-A2

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75080386

Auditor and Con-
 troller
 County of San Diego
 County Administra-
 tion Center
 1600 Pacific Highway
 San Diego,
 California 92101

University of
 California
1-900001727-A1

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Letter of Credit
 Universities of
 California
 Berkeley,
 California 94720

Santa Barbara

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San Diego

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	Los Alamos Lab.	1-856004458-A1	75081471
	Lawrence Livermore Lab.	1-946031193-A1	75081471
	Scripps Clinic and Res. Fndn.	1-951684089-A1	75087560
	Comptroller Scripps Clinic and Res. Fndn. 476 Prospect Street La Jolla, California 92037		
Connect- icut	Yale University	1-060646973-A1 1-060646973-A2 1-0606469730A4	75089755
	Treasurer Yale University Grants and Contracts 155 Whitney Avenue New Haven, Conn. 06511	1-060646973-A5 1-060646973-A6 1-060646973-A7 1-060646973-A8	
District of Columbia	Georgetown University	1-530196603-A1 1-530196603-A2 1-530196603-A3 1-530196603-A4 1-530196603-A5 1-530196603-A6 1-530196603-A7	75083450
	Treasurer Georgetown University 37th and O Streets, N.W. Washington, D.C. 20007		

District of Columbia	George Washington University 1-530196584-A1	1-530196584-A1 1-530196584-A3	75083441
	Treasurer George Washington University Rice Hall Washington, D.C. 20006		
	Gorgas Memorial Institute 1-530196518-A1	1-530196518-A1	75083522
	Treasurer Gorgas Memorial Institute 2007 I Street, N.W. Washington, D.C. 20007		
	National Academy of Sciences 1-530196932-A1	1-530196932-A1 1-530196932-A2	75085992
	Treasurer National Academy of Sciences 2101 Constitution Ave., N.W. Washington, D.C. 20037		
Florida	University of Florida 1-596001874-C7	1-596001874-C7 1-596001874-F2	75083326
Fiscal Contract officer	University of Florida, Room 106 R. Johnson Hall Gainesville, Florida 32611		
	University of Miami 1-590624458-A1	1-590624458-A1 1-590624458-A2 1-590624458-A3	75085253

Florida	Chief Accountant University of Miami P.O. Box 9057 Coral Gables, Florida 33124	1-590624458-A6	
Georgia	State of Georgia 1-581130678-A1 Director Department of Adm. Services Fiscal Division Pryor-Mitchell Building Atlanta, Georgia 30334	1-580973190-A2 1-581130678-A1 1-581130678-A5 1-581130678-A6 1-586000246-A2 1-586002042-A1 1-586002042-A2 1-586002042-A3 1-586002042-A4 1-586002042-A6 1-900000257-A1 1-900000648-A1	75083462
Guam	Territory of Guam 1-980018947-E6 Department of Administration P.O. Box 884 Government of Guam Agana , Guam 96110	1-000040215-A1 1-000040218-A1 1-000040228-A1 1-000040238-A1 1-000307495-A1 1-000313462-A1 1-900000270-A1 1-900000273-A1 1-900000274-A1 1-980018947-A1 1-980018947-A2 1-980018947-A3 1-980018947-A4 1-980018947-A7 1-980018947-A8 1-980018947-A9 1-980018947-81 1-980018947-B2 1-980018947-B3 1-980018947-85 1-980018947-D1 1-980018947-E5 1-980018947-E7 1-980018947-F1	75088368
Illinois	University of Illinois Medical Center 1-376000511 A5	1-376000511-A1 1-376000511-A3 1-376000511-A5 1-376000511-A8	75083885

Illinois	Business Manager University of Illinois Chicago, Illinois P.O. Box 6998 Chicago, Illinois 60680	1-376000511-A9 1-376000511-B2 1-376000511-B4 1-376000511-B5 1-376000511-C1 1-376000511-C2 1-376000511-C3	
Kansas	Kansas State University 1-480771751-A1 Comptroller Kansas State University of Agriculture & Applied Sciences Anderson Hall Manhattan, Kansas 66502	1-480771751-A1 1-480771751-A2	75084200
Louisiana	State of Louisiana 1-900001516-A1 Assistant State Treasurer State Treasurer's Office P.O. Box 44154 Capital Station Baton Rouge Louisiana 70804	1-000014399-A1 1-000014607-A1 1-237208290-A1 1-2372082900A2 1-720591509-A1 1-720637038-A1 1-7206370380A2 1-720645546-A1 1-720650883-A1 1-720695435-A1 1-720707278-A1 1-726000720-A1 1-726000733-A1 1-726000734-A1 1-726000734-A2 1-726000734-A3 1-726000743-A1 1-726000745-A1 1-726000756-A1 1-726000766-A1 1-726000800-A1 1-726000800-A2 1-726000813-A1 1-726000821-A1 1-726000821-A2 1-726000821-A3 1-726000821-A4 1-726000821-A5 1-726000826-A1	75080020

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Maine	Jackson Laboratories 1-010211513-A1	1-01211513-A1	75087315
	Financial Officer The Jackson Laboratories otter Creek Road Bar Harbor, Maine 04609		
Massachusetts	Boston University 1-042103547-A1	1-042103547-A1 1-042103547-A2 1-042103547-A4	75081272
	Comptroller Boston University 755 Commonwealth Avenue Boston, Mass. 02215		
	Forsyth Dental Center 1-042104230-A2	1-042104230-A1 1-042104230-A2	75083375
	Assistant Treasurer Forsyth Dental Center 140 Fenway Boston, Mass. 02115		
	Harvard University 1-042103580-81	1-042103580-A2 1-042103580-A3 1-042103580-A4 1-042103580-A5 1-042103580-A6	75083630
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Massachusetts	President & Fellows of Harvard College Cambridge, Mass. 02138	1-042103580-A7 1-042103580-A8 1-042103580-A9 1-042103580-81	
	Massachusetts General Hospital 1-041564655-A4	1-041564300-A1 1-041564655-A3 1-041564655-A4	75084810
	Treasurer Massachusetts General Hospital 45 Milk Street Boston, Mass. 02114	1-041564655-A5	
	Massachusetts Institute of Technology 1-042103594-A1	1-042103594-A1 1-042103594-A2	75084836
	Fiscal Officer Division of Sponsored Research Massachusetts Institute of Technology Cambridge, Mass. 02139		
	Worcester Foundation 1-042121658-A1	1-042121658-A1	75089680
	Finance Officer Worcester Foundation for Experimental Biology, Inc. 222 Maple Avenue Shrewsbury, Massachusetts 01545		
Maryland	Johns Hopkins University 1-520595110-A5 University Budget officer Johns Hopkins university Garland Hall, Rm 327 Charles and 34th Streets, Baltimore, Md. 21218	1-000701501-A1 1-520595110-A1 1-520595110-A2 1-520595110-A3 1-520595110-A4 1-520595110-A5	75084130

Michigan	University of Michigan 1-386006309-A1	1-386006309-A1 1-386006309-A2 1-386006309-A3	75085301
	University Cashier Regents of the University of Michigan 1015 L.S. & A. Bldg. Ann Arbor, Michigan 48104	1-386006309-A4 1-386006309-A5 1-386006309-A6 1-386006309-A7 1-386006309-A8 1-386006309-A9 1-386006309-81 1-386006309-B2	
Minnesota	Mayo Foundation 1-416011702-A1	1-416011702-A1 1-416011702-A2	75084875
	Treasurer Mayo Foundation 200 First St. S.W. Rochester, Minnesota 55901		
	University of Minnesota 1-416007513-A5	1-416007513-A1 1-416007513-A2 1-416007513-A3	75005448
	Director , Research Administration 105 Admin. Servs. Building 2610 University Avenue, St. Paul Minnesota 55114	1-416007513-A5 1-416007513-A8 1-416007513-B2 1-416007513-83 1-416007513-B4 1-416007513-B5 1-416007513-87	
Missouri	Midwest Research Institute 1-440545878-A1	1-440545878-A1	75085361
	Treasurer Midwest Research Institute 425 Volker Blvd. Kansas City, Missouri 64110		
Nebraska	State of Nebraska. 1-470491233-C5	1-000021900-A1 1-210674761-A1 1-470491233-A1	75086320

Nebraska	State of Nebraska	1-470491233-A3	
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	Administrative	1-470491233-A6	
	services office	1-470491233-A7	
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New York	Adelphi University	1-111630741-A1	75080040
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	Business Manager		
	Adelphi University		
	South Avenue		
	Garden City,		
	New York 11530		
	Albany Medical Center	1-141338310-A1	75080150
	1-141338310-A1		
	Assistant Treasurer		
	Albany Medical		

New York	College of Union University 47 New Scotland Avenue Albany, New York 12208		
	Children's Hospital of Buffalo 1-160748423-A1	1-160748423-A1	75082160
	Comptroller Children's Hospital of Buffalo 219 Bryant Street Buffalo, N.Y. 14222		
	New York Medical College 1-131099420-A1	1-131099420-A1	75086270
	Treasurer New York Medical College Flower/Fifth Avenue Hospitals 1 East 105th Street New York, N.Y. 10029		
	New York University 1-135562308-A1	1-135562308-A1 1-135562308-A3 1-135562308-A4	75086330
	Assistant Controller New York University 500 Kimball Hall Washington Square - New York, New York 10003	1-135562308-A5 1-135562308-A6	
	New York University Medical Center 1-135562309-A1	1-135562308-A2 1 - 135562308- 81 1-135562309-A1 1-135562309-A2 1-135562309-A3 1-229124053-A1	75086333
	Comptroller New York University Medical Center 550 First Avenue New York, New York 10016		

New York	University of	1-160743209-A1	75087272
	Rochester	1-160743209-A2	
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	University of	1-160743209-A5	
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	University of New York	1-141363361-A1	
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<p>New York Research Foundation of the City university of New York 1-131988190-A1</p> <p>Treasurer Research Foundation of the City University of New York 1411 Broadway New York, New York 10018</p> <p>State of New York 1-146013200-J7</p> <p>Director, State Accounts Alfred E. Smith Building, Albany New York 12225</p>	<p>1-131988190-A1 1-131988190-A8</p> <p>1-146013200-A1 1-146013200-A2 1-146013200-A3 1-146013200-A4 1-146013200-A5 1-146013200-A6 1-146013200-A7 1-146013200-A8 1-146013200-A9 1-146013200-B1 1-146013200-B2 1-146013200-B3 1-146013200-B4 1-146013200-B5 1-146013200-B6 1-146013200-B7 1-146013200-88 1-146013200-89 1-146013200-C1 1-146013200-C2 1-146013200-C3 1-146013200-C4 1-146013200-C5 1-146013200-C6 1-146013200-C8 1-146013200-C9 1-146013200-D1 1-146013200-D2 1-146013200-D3 1-146013200-D4 1-146013200-D5 1-146013200-D6 1-146013200-D7 1-146013200-D9 1-146013200-E1 1-146013200-E2 1-146013200-E3 1-146013200-H5 1-146013200-H6</p>	<p>75082337</p> <p>75086340</p>
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Ohio	Case Western Reserve University 1-341018992-A1 Comptroller Case Western Reserve University 2040 Adelbert Road Cleveland, Ohio 44106	1-341018992-A4 1-341018992-A1 1-341018992-A2	75089472
Tennessee	St. Jude's Children's Research Hospital 1-620646012-A1 Treasurer St. Jude's Children's Hospital 332 N. Lauderdale Memphis, Tennessee 38101	1-620646012-A1	75083427

Texas	Baylor University College of Medicine 1-741613878-A2 Business Manager Baylor College of Medicine 1200 Moursund Ave. Houston, Texas 77025	1-741613878-A1 1-741613878-A2	75081070
	University of Texas at Houston Health Center 1-741761309-A4	1-741761309-A4 1-741761309-A6	75088056
	Associate Dean for Business Affairs University of Texas Medical School P.O. Box 20036 Houston, Texas 77025		
	University of Texas Medical School 1-756002868-A4	1-756002868-A3 1-756002868-A4 1-756002868-A5	75088130
	Business Manager University of Texas Southwestern Medical Schools 5323 Harry Hines Blvd. Dallas, Texas 75235		
	University of Texas M.D. Anderson Hospital 1-746001118-A1	1-746001118-A1	75088910
	Supervisor, Grant Reporting M.D. Anderson Hospital University of Texas 6723 Bertner Ave. Houston, Texas 77025		
	University of Texas Medical Branch, Galveston, Texas 1-74600949-A1	1-74600949-A1	75088916

Texas	Business Manager University of Texas Medical Branch 1000 strand Galveston, Texas 77550		
Utah	University of Utah and University of Utah Research 1-876000525-A6	1-876000525-A1 1-876000525-A2 1-876000525-A3 1-876000525-A6 1-876000525-A7	75089067
	Controller University of Utah 122 Park Building Salt Lake City, Utah 84112	1-876000525-A8	
Washing- ton	University of Washington 1-916001537-A5 Director Office of Grant/ Contract Services University of Washington 211 Administration Building Seattle, Washington 98195	1-916001537-A1 1-916001537-A2 1-916001537-A4 1-916001537-A5 1-916001537-A6 1-916001537-A9	75089320
Wisconsin	State of Wisconsin 1-396006469-B1 ' Budget Operations State Budget office One West Wilson St. Madison, Wisconsin 53607	1-000039594-A1 1-000702000-A1 1-390808464-A1 1-391051231-A1 1-396006436-A1 1-396006443-A3 1-396006447-A1 1-396006461-A1 1-396006461-A2 1-396006461-A3 1-396006461-A4 1-396006461-A5 1-396006461-A6 1-396006461-A7 1-396006461-A8 1-396006461-A9 1-396006461-81	75088610

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ATTACHMENT I

Single Letter of Credit Recipients and Central Point Addresses

<u>State</u>	<u>Organization and Payee Number</u>	<u>Recipient.CRS-EIN*</u>	<u>Letter of Credit</u>
Alabama	University of Alabama Medical Center 1-636005396-A4	1-636001138-A2 1-636001138-A3 1-636001138-A4 1-636001138-A5 1-636001138-B1 1-636005396-A3 1-636005396-A4 1-636005396-A5 1-636005396-A6 1-636005396-A7 1-636005396-A8	75080110
	Director Office of Grants and Contracts Accounting University of Alabama University Station Birmingham, Alabama 35296		
	University of Alabama 1-636001138-A1	1-636001138-A1 1-636001138-A6 1-636001138-A7 1-636001138-A8 1-636001138-A9 1-636001138-82 1-636001138-83 1-636001138-84	75050115
	Comptroller University of Alabama P.O. Box M University, Alabama		

*Central Registry-System Entity Identification Number (CRS-ELN)

CRS-EIN is a twelve digit number used to identify a recipient organization/individual in the **HHS Central Registry System (CRS)**. This system utilizes a standard **identification** number within HHS to identify recipients of Federal assistance-like programs. The first digit identifies whether the recipient is an organization **(1)** or individual **(2)**. The next nine **(9)** digits uniquely associate the organization/individual to an Employer Identification Number assigned by the Internal Revenue Service in the case of an organization, or a Social **Security** Number assigned by the Social Security Administration in the case of an individual. A two character suffix code is assigned by the Central Registry System, HHS, to identify **component** levels within the recipient organization, such as: School of Medicine, **Research** Division, Department of Biology, etc. A suffix is not applied to a **Social** Security Number since that number is unique to each individual.

Alabama	Southern Research Institute 1-630288868-A2	1-630288868-A1 1-630288868-A2	75083532
	Financial Officer Southern Research Institute 2000 - 9th Avenue, South Birmingham, Alabama 35205		
Alaska	State of Alaska 1-900001517-A1	1-000700389-A1 1-926001185-A2 1-926001185-A3 1-926001185-A4 1-926001185-A5 1-926001185-A7	75080021
	Director Division of Finance Department of Administration Pouch C Juneau, Alaska 99801 .	1-926001185-81 1-926001185-B2 1-926001185-83 1-926001185-86 1-926001185-B7 1-926001185-88 1-926001185-B9 1-926001185-C1 1-926001185-C2	
Arizona	State of Arizona 1-866004791-B?	1-866004791-A1 1-866004791-A2 1-866004791-A3 1-866004791-A4 1-866004791-A5 1-866004791-A6 1-866004791-A7 1-866004791-A8 1-866004791-A9 1-866004791-82 1-866004791-B3 1-866004791-B7 1-866004791-88 1-866004791-C2 1-866004791-C5 1-866004791-C7 1-866004791-C8 1-866004791-C9 1-866004791-D1 1-866004791-D2 1-866004791-D3	75050628
	State Treasurer's Office State Capital Phoenix, Arizona . 85007		

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